Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. _____

LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE P. NEUHART,

Petitioners,

v.

COLETTE Y. MACHADO, LEIFF KOA BUSH, MARTIN D. L. KAHAE, KELSON "MAC" POEPOE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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QUESTION PRESENTED FOR REVIEW

Whether the Hawaii Supreme Court has effected a regulatory and/or judicial taking of private property without just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution (made applicable to the States by the Fourteenth Amendment to the United States Constitution) and this Court's prior decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) where it has retroactively altered the law of real property in such a manner as to deprive Petitioners of economically viable uses of their agricultural/pastoral leases under the Hawaiian Homes Commission Act of 1920, 48 U.S.C. §§ 691, et seq., and the Admission Act of 1959 (Hawaii), 48 U.S.C. Prec. § 491.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. _____

LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE P. NEUHART,

Petitioners,

v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioners LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL

KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE NEUHART (hereinafter "Petitioners"), by and through their attorneys, FUJIYAMA, DUFFY & FUJIYAMA, respectfully pray that a writ of certiorari issue to review the Opinion, the Order Denying Reconsideration, and the Notice And Judgment On Appeal of the Supreme Court of the State of Hawaii respectively entered in this proceeding on May 24, 1996, July 8, 1996 and July 10, 1996, in order to prevent a regulatory and/or judicial taking of private property without just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution and this Court's prior decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

QUESTION PRESENTED FOR REVIEW

Whether the Hawaii Supreme Court has effected a regulatory and/or judicial taking of private property without just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution (made applicable to the States by the Fourteenth Amendment to the United States Constitution) and this Court's prior decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) where it has retroactively altered the law of real property in such a manner as to deprive Petitioners of economically viable uses of their agricultural/pastoral leases under the Hawaiian Homes Commission Act of 1920, 48 U.S.C. §§ 691, et seq., and the Admission Act of 1959 (Hawaii), 48 U.S.C. Prec. § 491.

PARTIES TO THE PROCEEDINGS

(1) *Petitioners.*

Petitioners LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA,

PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE NEUHART (Lessee Defendants-Appellees in the court below) are each non-affluent Native Hawaiian lessees and beneficiaries of agricultural/ pastoral leases under the Hawaiian Homes Commission Act of 1920, 48 U.S.C. §§ 691, et seq., and the Admission Act of 1959 (Hawaii), 48 U.S.C. Prec. § 491. They have each had Third-Party Agreements ("TPAs") with non-Hawaiian licensees solicited and approved by the Department Of Hawaiian Home Lands, State of Hawaii ("DHHL") and the Hawaiian Homes Commission, State of Hawai'i ("HHC").

(2) *Respondents.*

Respondents COLETTE Y. MACHADO, LEIFF KOA BUSH, MARTIN D. L. KAHAE, and KELSON "MAC" POEPOE (Plaintiffs-Appellants in the court below) have each objected to TPAs.

Respondent KALI WATSON was a Defendant-Appellee in the proceedings below in his official capacity as Chairperson of the Hawaiian Homes Commission and Respondents ANDREW APANA, NANI BRANDT, DENNIS KAUAHI, ROBERT McFARLAND, ANN NATHANIEL, ALVINA PARK, GEORGE ROBERTSON and PATRICIA SHEEHAN, were Defendants-Appellees in their official capacities as members of the Hawaiian Homes Commission. Respondents DEPARTMENT OF HAWAIIAN HOME LANDS and HAWAIIAN HOMES COMMISSION are each subdivisions of the STATE OF HAWAII charged with administration of leases under the HHCA.

Respondent JAMES A. BOSWELL, JR. was also a Lessee Defendant-Appellee in the proceedings below and possessed a TPA solicited and approved by HHC/DHHL.

Respondents LARRY JEFTS, WILLIAM F. PFEIL, HAWAIIAN RESEARCH, LTD., GRANT SCHULE, SEIZEN J. BONK, and NAFETALAI OTO are Non-Native Hawaiian licensees under the TPAs.

Respondents MARGARET E. KALILIKANE, MARY K. MAMUAD, HERMAN K. PUAA, LORRAINE M. VINCENT, LILLIAN K. AKINA, RONALD K. AKINA, HENRIETTA M. DAVIS, MATTHEW K. ADOLPHO, JR., JOHN K. KAPU III, JULIA KELIIKULI-PETERS, and TOMI LOU MAMUAD, OR THEIR SUCCESSORS AND ASSIGNS are lessees who have entered into TPAs that may or may not have been approved by the HHC/DHHL.

OPINIONS BELOW

The Opinion of the Hawaii Supreme Court, entered May 24, 1996, has been published as *Bush v. Watson*, 81 Haw. 474, 918 P.2d 1130 (1996) and is reprinted as Appendix "A" hereto. By unpublished Order entered July 8, 1996, reprinted as Appendix "B" hereto, the Hawaii Supreme Court denied a timely Motion For Reconsideration (i.e., rehearing) brought pursuant to Rules 27 and 40 of the Hawaii Rules of Appellate Procedure. On July 10, 1996, the Hawaii Supreme Court entered an unpublished Notice And Judgment On Appeal, reprinted as Appendix "C" hereto.

These appellate decisions arose from an unpublished Order entered March 31, 1995 and Judgment entered July 18, 1995 both of the Circuit Court of the Second Circuit, State of Hawaii, reprinted respectively as Appendices "D" and "E".

STATEMENT OF JURISDICTION

The Opinion of the Hawaii Supreme Court was entered May 24, 1996. *Bush v. Watson*, 81 Haw. 474, 918 P.2d 1130 (1996), Appendix "A" hereto. On June 3, 1996, Petitioners filed a timely Motion For Reconsideration (i.e., rehearing) pursuant to Rules 27 and 40 of the Hawaii Rules of Appellate Procedure, which was denied by unpublished Order entered July 8, 1996. Appendix "B" hereto. On July 10, 1996, the Hawaii Supreme Court entered an unpublished Notice And Judgment On Appeal. Appendix "C" hereto.

This petition for certiorari is filed within ninety (90) days of the July 8, 1996 Order and is timely under this Court's Rules 13.3 and 29.2.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Takings Clause, Fifth Amendment, United States Constitution:

> ****[N]or shall private property be taken for public use without just compensation.****

HHCA § 208(5):

> The lessee shall not in any manner transfer to, or otherwise hold for the benefit of, any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department, or agree to so transfer, or otherwise hold, the person's interest in the tract. Such interest shall not, except in pursuance of such a transfer to or holding for or agreement with a native Hawaiian or Hawaiians approved of by the department, or for any indebtedness the payment of which has been assured by the department, including loans from other agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet the person's interest in the tract or improvements thereon.

STATEMENT OF THE CASE

This appeal arises out of litigation brought by one group of Native Hawaiians against another group of Native Hawaiians (including Petitioners) over Third-Party Agreements (hereinafter "TPAs"), duly formulated, solicited and approved by the Department of Hawaiian Home Lands (hereinafter "DHHL") and the Hawaiian Homes Commission (hereinafter "HHC") granting revocable licenses to certain non-Native Hawaiian licensees to assist Native Hawaiians in making meaningfully beneficial use of agricultural homestead leases pursuant to the Hawaiian Homes Commission Act of 1920 (hereinafter "HHCA"), 48 U.S.C. §§ 691 et seq., and the Admission Act of 1959 (hereinafter "Admission Act"), 48 U.S.C. Prec. § 491.

In its May 24, 1996 opinion, a true copy of which is attached hereto as Appendix "A", the Hawaii Supreme Court, among other things, held that:

(1) Lessee Defendants-Appellees do *not* possess substantial property interests;[1] and

(2) Lessee Defendants-Appellees' grant of licenses in the form of Third-Party Agreements ("TPAs") convey at least a portion of their "extant" property interests in violation of HHCA § 208(5);[2]

---

[1]May 24, 1996 Opinion at 19-21 (citing Bush v. Hawaiian Homes Commission *["Bush I"]*, 76 Haw. 128, 870 P.2d 1272 (1994)).

[2]May 24, 1996 Opinion at 21-28.

Under Rule 40 of the Hawaii Rules of Appellate Procedure (hereinafter "HRAP"), the Hawaii Supreme Court may reconsider a previously rendered opinion where the court has overlooked or misapprehended a point of law or fact. *See State v. Kwak*, 80 Haw. 297, 909 P.2d 1112 (1995) (reconsideration is appropriate where the Hawaii Supreme Court has misapprehended a point of law); *Yoshizaki v. Hilo Hospital*, 50 Haw. 40, 429 P.2d 829 (1967) (per curiam) (Under prior law, rehearing by the Hawaii Supreme Court is ordinarily ordered in a situation where the Court has overlooked controlling authority or some other matter material to the decision.).

In their Memorandum In Support Of Motion For Reconsideration filed June 3, 1996, Petitioners contended that the Hawaii Supreme Court's May 24, 1996 Opinion may have misapprehended or overlooked the following points of fact and/or law:

1. If the Court's conclusion that Petitioners do *not* possess property interests is correct, then, under the general rule that a grantor can convey no greater rights than it possesses, it is logically impossible for Petitioners to convey property interests in the Third-Party Agreements ("TPAs");

2. If Petitioners possess property interests, then, as a matter of law, no interests were conveyed via the Third-Party Agreements where, under the prior weight of authority of the Hawaii Supreme Court and elsewhere, licenses are not property interests;

3. If Petitioners possess property interests, then the Hawaii Supreme Court's opinion is a taking of property interests without just compensation in violation of the United States and Hawaii Constitutions; and

4. Summary judgment should not be granted in favor of the party bearing the burden of proof. *See* Appendix "F" at 3, 4-25.

For these reasons, and in good faith, Petitioners requested reconsideration of the Hawaii Supreme Court's May 24, 1996 Opinion and affirmance of the lower court's judgment.

REASONS FOR GRANTING THE WRIT

The instant Petition For Writ Of Certiorari should be granted for reasons including, but not limited to, the following:

I. *IT IS LOGICALLY IMPOSSIBLE FOR PETITIONERS TO CONVEY PROPERTY INTERESTS IN THE TPAS IF THEY DID NOT POSSESS PROPERTY INTERESTS.*

It is fundamental law that a grantee of rights can possess no greater rights than the grantor possessed before the grant. *E.g.*, *Liberty Mutual Insurance Co. v. United National Insurance Co.*, 69 Haw. 37, 41, 731 P.2d 167, 170 (1987) (subrogee possesses no greater rights than that originally available to subrogor); *Fred v. Pacific Indemnity Co.*, 53 Haw. 397, 494 P.2d 783 (1972) (substituted loss-payee under marine insurance policy could assert no greater rights than those of original assured); *Lee v. North Dakota Park Service*, 262 N.W.2d 467 (N.D. 1977) (licensee could acquire no greater rights than that possessed by licensor).

Accordingly, if the Court's conclusion that Petitioners do *not* possess property interests is correct, then, under the general rule that a grantor can convey no greater rights than it possesses, it is logically impossible for Petitioners to convey property interests in the Third-Party Agreements ("TPAs"). If no property interests were conveyed, there could be no violation of HHCA § 208(5).

II. *THE MAY 24, 1996 OPINION CONSTITUTED A RETROACTIVE CHANGE IN THE LAW WHERE THE GRANT OF LICENSES IN THE TPAS DID NOT CONVEY PROPERTY INTERESTS UNDER HAWAII LAW PRIOR TO THE HAWAII SUPREME COURT'S MAY 24, 1996 OPINION.*

The Hawaii Supreme Court's suggestion that Petitioners do not possess substantial property interests in its May 24, 1996 Opinion is contrary to its prior decisions, as is its conclusion that licenses can convey property interests, and both are retroactive changes in the law.

In *Aged Hawaiians v. Hawaiian Homes Commission*, 78 Haw. 192, 891 P.2d 279 (1995), *cert. denied sub nom, Hawaiian Homes Commission v. Aged Hawaiians*, 116 S. Ct. 77 (1995), the Hawaii Supreme Court held that *prospective* lessees of pastoral leases under the HHCA possess property

rights substantial enough to be entitled to due process protection. *See also State v. Jim*, 80 Haw. 168, 907 P.2d 754 (1995) (recognizing that State of Hawaii owes trust obligations to Native Hawaiians generally with respect to HHCA lands); *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982) (Native Hawaiians are beneficiaries of fiduciary trust obligations owed by the State of Hawaii).

If *prospective* HHCA lessees possess property rights capable of due process protection, then, *a fortiori*, *existing* Native Hawaiian lessees of HHCA leases, including Petitioners, most assuredly possess substantial property rights. Although Petitioners possess substantial property rights, their grant of revocable licenses in the TPAs do not convey property "interests" within the meaning of HHCA § 208(5) where: (1) licenses in the law of real property, in this jurisdiction and others, do not convey property interests, (2) the essential character of a license is not affected by any notice provisions, (3) policy considerations preclude characterization of licenses as interests in land, and (4) it remains undisputed that Petitioners did not convey the entirety of their "interests in the tract."

A. *Licenses Do Not Convey Property Interests.* In its May 24, 1996 Opinion, the Hawaii Supreme Court concluded, for the first time, that licenses can convey property interests. However, the prior weight of authority is that licenses, in the law of real property in this jurisdiction and others, do not convey property interests.

1. *Hawaii law.* Although the Hawaii Supreme Court ultimately concluded otherwise, in footnote 11 of the same May 24, 1996 Opinion, the Hawaii Supreme Court inconsistently recognized that, by definition, a license is repugnant to an interest in land:

> A license in real property is defined as a personal, revocable, and unassignable privilege conferred either by writing or parole, to done or more acts on land *without possessing any interest therein... [A] license is distinguishable from a lease in that a lease conveys an interest in land* and transfers possession[.]

25 Am. Jur. 2d *Easements and Licenses* § 125 at 527-28 (1966). *See also Black's Law Dictionary* 919-20 (6th ed. 1990) (A 'license' is a 'personal privilege to do some particular act or series of acts on land

without possessing any estate or interest therein, and is ordinarily revocable at the will of the licensor and is not assignable.').

May 24, 1996 Opinion at 17 n.11 (emphasis added).

Even if *Adolpho v. Kealoha*, Civil No. 243 (Haw. 2d Cir. 1960) was discounted (as was done by the Hawaii Supreme Court), the above-quoted portion of the Court's May 24, 1996 opinion is the only correct statement of Hawaii law. In *Kapiolani Park Preservation Society v. City & County Of Honolulu*, 69 Haw. 569, 579, 751 P.2d 1022, 1028-29 (1988) (cited on other grounds by the Court in its May 24, 1996 Opinion at 25), the Hawaii Supreme Court followed a "plethora of decided cases" and articulated a sharp distinction between leases and licenses by focusing on the fact that the former conveys an interest in land whereas the latter does not:

> There are a plethora of decided cases distinguishing between *leases, which convey an interest in land*, and mere licenses of which concessions are an example.
>
> * * * *
>
> A 'license' in the law of real property is 'authority to do a particular act or series of acts upon another's land *without possessing any estate therein*.' [Citation omitted.] It is a personal privilege, is not assignable, ceases upon the death of either party and is revoked by a sale of the land by the licensor. But the agreement expressly binds the executors, administrators, and assigns of the parties... *If the instrument in question passes to the plaintiff a right to use the land for a definite term for a specific purposes,... it creates an 'interest' in land and therefore it does not create a license revocable at the will of the licensor[.]*

(Quoting *McCandless v. John Ii Estate*, 11 Haw. 777, 788-89 (1899)) (emphasis added).[3] *See also In re Fasi*, 64 Haw. 624, 629 n.8, 634 P.2d 98, 102 n.8 (1981) (The Hawaii Supreme Court held that a license was not sufficient to transfer property interests for purposes of real property taxation where a license "is an authority to do a particular act or series of acts upon another's land without possessing any estate therein."); *Consolidated Amusement Co. v. Waikiki Business Plaza, Inc.*, 6 Haw. App. 312, 318, 719 P.2d 1119, 1123-24 (1986) (A license "is an authority to do a particular act or series of acts upon another's land without possessing any estate therein.").

The foregoing authorities also dictated that, in determining whether a particular grant is a license, the Court should look to the terms of the grant to determine the intent of the parties. *See also Territory v. Tsunekichi*, 23 Haw. 813, 820-21 (1917). As the Court recognized, by their terms, the TPAs are revocable at will and do *not expressly* convey any property interest from the lessee. In *Ideta v. Kuba*, 21 Haw. 751 (1913), the Hawaii Supreme Court held that a similar agreement was merely a license *revocable at will* and did not create an easement with respect to a right of way.

> In our judgment the case presents an illustration of a simple parol license bare of any special or complicating features – a mere personal privilege – which under all the authorities is *revocable at the will of the licensor*. 1 Washburn, Real Prop. (5th ed) 632; 25 Cyc. 645. We conclude that the respondent was acting within his rights in the premises when he revoked the license, that *his right to revoke it was subject to no condition*, and that the complainant failed to show that he was entitled to the injunction sought.

Id. at 755 (emphasis added). Moreover, the concurring opinion of Justice De Bolt suggests the same conclusion.

---

[3]Although the Court did not expressly find that the TPA's are "subleases," it should be noted that just as licenses do not convey interests in land under Hawaii law, licenses are not subleases under Hawaii law and elsewhere. In *Brewer v. Chase*, 3 Haw. 127, 140 (1869), the Hawaii Supreme Court recognized that a covenant against "subletting" was not breached by the sharing of office space with a physician. Applying similar principles, courts have generally held that licenses to third parties do not constitute subletting. *See, e.g., Mann Theatres Corp. v. Mid-Island Shopping Plaza Co.*, 94 A.D.2d 466, 471-72, 464 N.Y.S.2d 793, 798 (1983), *aff'd*, 62 N.Y.2d 930, 468 N.E.2d 51, 479 N.Y.S.2d 213 (1984).

> I am inclined to the view that the record shows that the new right of way is an executed license; but *the great weight of authority is, as I believe, that neither the execution of the license, nor the incurring of expense, nor both combined, affect the right of the licensor to revoke.*

Id. at 755-66 (emphasis added; citations omitted).

Ideta and other decisions of the Hawaii Supreme Court set forth the general rule that a "license," by definition, is revocable at the will of the putative "licensor" and does not convey any property "interest." In *Kamehameha v. Nahaolelua*, 2 Haw. 378 (1861), the plaintiff brought a trespass action against certain defendants with respect to their entry on a property located in Lahaina. The defendants in turn contended that the Plaintiffs' guardian had granted a public right of way with respect to the property. In rejecting this contention, the Hawaii Supreme Court held that the mere fact that the guardian had permitted defendants to use the way did not convey any property interest in the way.

> [O]n the contrary, it appears to us that the re-opening of the way over the plaintiff's premises, by Mr. Ii, amounted to nothing more than a renewal of the former *permissive use*, which had been temporarily interrupted; and being in law *not a dedication*, but merely a license revocable, the plaintiff may revoke the license at his pleasure, and resume the possession of the *locus in quo*.

Id. at 381 (emphasis in original).

As set forth above, the Hawaii Supreme Court's conclusion that a "mere license" can be an interest in land is contrary to virtually all of the numerous prior Hawaii decisions on the subject and would therefore constitute a radical departure from Hawaii law.[4]

2. *Other jurisdictions.* As correctly set forth in footnote 11 of the Hawaii Supreme Court's May 24, 1996 Opinion, the black-letter law of other jurisdictions is that licenses are simply *not* "interests" in land in the pure sense of the term.

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[4]Such a departure also violated the doctrine of stare decisis and jeopardized the Court's declared practice of upholding the desire that the law provide a clear guide for individuals to enable them to plan their affairs without untoward surprise and the Court's goal of maintaining public faith in the Court. *See Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982).

The two primary authorities cited by the Court in support of the contrary conclusion are nevertheless in accord with this view. For example, while the Court cited comment c to Restatement Of Property § 512 for the proposition that a license is an "interest" in land for purposes of the Restatement, the gravamen of that comment is the opposite with respect to statutory uses of the phrase "interests in land":

> *This does not mean that they are 'interests in land' in every use of the phrase.* For example, it does not mean that they are necessarily 'interests in land' as that phrase is used in the *Statute Of Frauds*.

(Emphasis added).

Likewise, the thrust of 3 R. Powell, *Powell On Real Property* § 34.25 (Rohan ed. 1996), also cited by the Court, is that licenses are *not* "substantial interests in land" for purposes of statutory construction.

> Such a revocable privilege is an 'interest in land' as that has been defined in Section 5 of the Restatement of Property and as the term is used in this Treatise. *This does not mean (1) that the revocable privilege should be treated as a substantial interest in land, or (2) that it is such an interest in land as comes within statutory requirements of a writing or of a seal for its creation*, or (3) that the licensee is entitled to compensation on a taking of a servient parcel by condemnation. *The evanescent, fleeting, revocable character of the interest justifies a denial of treatments accorded to more substantial interests in land* but does not justify a denial of its character as an interest in land, while it lasts.

(Emphasis added); *see also United States v. Anderson County, Tennessee*, 575 F. Supp. 574, 578 (E.D. Tenn. 1983), *aff'd*, 761 F.2d 1169 (6th Cir. 1985), (holding that, notwithstanding Restatement view, "[a] license creates no estate in land and is generally not considered an interest in land. 53 C.J.S. Licenses § 79 (1948); 25 Am. Jur. *Easements & Licenses* § 123 (1966)."); *Race v. Meyer*, 640 N.Y.S.2d 664, 667 (A.D. 1996) (a license is merely a personal privilege to do some act on land without possessing any interest therein); *Sammons v. American Automobile Assn.*, 912 P.2d 1103, 1105 (Wyo. 1996) (A license does not give any interest in the land); *Lodestar Tower North Palm Beach, Inc. v. Palm Beach Television Broadcasting, Inc.*, 665 So.2d 368, 370 (Fla. Dist. Ct. App. 1996) (A license confers no interest

but merely gives one authority to do a particular act on another's land, may be created orally, and is generally revocable.).

Since the weight of authority is that a license is *not* a substantial interest in land, the TPAs cannot have conveyed property interests under prior law.

3. *The Essential Character Of A License Is Not Affected By Notice Provisions.* The Hawaii Supreme Court placed a large degree of significance on the TPAs' notice provisions, which, in the Court's view, "arguably" created a fixed term to the TPAs. May 24, 1996 Opinion at 27.[5] However, again, the weight of prior authority in the Hawaii Supreme Court and elsewhere, was that notice provisions do *not* affect the essential nature or term of a transaction.

In *Hawaiian Electric Co. v. DeSantos*, 63 Haw. 110, 621 P.2d 971 (1980), the Hawaii Supreme Court held that a six-month notice requirement in a lease did not alter the conclusion that successor tenants were month to month tenants and reasoned that "obviously," termination of leases is covered by the respective lease agreements.

Likewise, in *FFG, Inc. v. Jones*, 6 Haw. App. 35, 708 P.2d 836 (1985), the Intermediate Court of Appeals held that a notice provision in a lease agreement governing termination did not in any way inhibit or restrict the lessor's right to enforce the terms of the Lease without waiting 30 days and seeking a termination of the Lease.

Applying similar rationales, courts have held that notice provisions do not transform a license into a lease where the essential nature of the transaction (other than the notice provision) is a license.

In *Lee v. North Dakota Park Service*, 262 N.W.2d 467 (N.D. 1977), the North Dakota Supreme Court held that a license was not transformed into a lease and its revocability was not affected by a notice provision.

In *Ideal Trading Corp. v. 237 East Ontario Corp.*, 82 Ill. App. 2d 160, 170-72, 227 N.E.2d 150, 155-56 (1967), the Illinois Appellate Court held that a notice provision did not create an irrevocable license.

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[5]In its May 24, 1996 Opinion at 27 n.20, the Court did not deem it significant that certain of the TPAs contain a blank notice period. However, in situations where the notice period is blank, no notice is required for revocation of those respective TPAs, and the Court's concern with "fixed terms" would apparently be obviated. Consequently, at the very least, those TPAs with blank spaces concerning notice requirements should have been upheld.

In *Lake Martin/Alabama Power Licensee Association, Inc. v. Alabama Power Co.*, 547 So.2d 404, 409 (Ala. 1989), the Alabama Supreme Court held that a fixed notice provision did not affect the revocability of a license.

Consequently, the TPAs' notice provisions did not affect their essential character as being nothing more than a license that does *not* convey any interests in the respective leases under prior Hawaii law.

4. *Public Policy Precludes Treatments Of Licenses As Interests In Land.* Petitioners also pointed out that characterization of licenses as interests in land can have undesirable consequences from a public policy standpoint. For example, in this jurisdiction, interests in land can be taxed by property taxes, conveyance taxes, and are subject to the statute of frauds and recordation requirements, among other things.

In contrast, licenses include football tickets to University of Hawaii games at Aloha Stadium and movie tickets to one's favorite theatre. *See* R. Powell, *supra*. In each event, there is a revocable privilege of entry upon land which, under this Court's May 24, 1996 Opinion, are interests in land. Yet, it is unlikely that anyone would seriously contend that a U.H. football ticket or a movie ticket should be subject to conveyance taxes or property taxes. Imposition of such taxes would cripple the University of Hawaii athletic department budget by deterring fan attendance and undermine the jobs created by such events.

In addition, the State of Hawaii does a substantial amount of its contracting work at the Honolulu International Airport via license agreements. *See In re Fasi*, 64 Haw. 624, 634 P.2d 98 (1981). Again taxation of such arrangements as conveyances of "property interests" would have adverse consequences. Even worse, characterization of such arrangements as "property interests" may risk a regulatory takings issue every time such an arrangement is terminated or revoked.

In the instant case, the Hawaii Supreme Court's broad declaration that a homestead lessee's licenses are property interests in violation of HHCA § 208(5) may also have larger implications with respect to the federally-funded Molokai Agricultural Community ("MAC") program in which homestead lessees enter into agreements with the federal government for agricultural aid/cost-sharing in exchange for certain conditions with regard to soil and water conservation, including, but not limited to, rights of entry

and contract periods of five to fifteen years. *See* Exhibit "C" to Appendix "F" attached hereto. Where many of Plaintiffs-Appellants themselves participated in the MAC program, it is undisputed that the MAC program is a socially desirable means of Native Hawaiian betterment. Yet, where these contractual arrangements are comparable to the TPAs in the instant case, they are arguably voided by this Court's May 24, 1996 Opinion.

5. *There Is No Violation Of HHCA § 208(5) Where Lessee Defendants Did Not Convey The Entirety Of Their Interests In The Tract.* HHCA § 208(5) prohibits transfers of "the person's interest in the tract." *See* May 24, 1996 Opinion at 16-17. In contrast, the Hawaii Supreme Court held that Lessee Defendants-Appellees transferred "at least a portion of the lessee's extant interests in the homesteads." *Id.* at 27. It remains undisputed that Lessee Defendants-Appellees did not transfer their entire "interest in the tract" and, accordingly, there could be no violation of HHCA § 208(5).

As shown by the foregoing, the May 24, 1996 Opinion constituted a retroactive change in the law. As more fully set forth below, this retroactive change in the law amounts to a taking of private property without just compensation.

III. *THE COURT'S MAY 24, 1996 OPINION IS A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION.*

It is presumed that a legislative body does not intend an unconstitutional result and a statute should not be construed to bring about such results where they can reasonably be avoided. *See Kapiolani Park Preservation Society v. City and County of Honolulu*, 69 Haw. 569, 751 P.2d 1022 (1988).

The Fifth Amendment Of the United States Constitution, made applicable to the States via the Fourteenth Amendment, forbids that "private property be taken for public use without just compensation." Article I, Section 20 of the Hawaii State Constitution is to the same effect.

In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), the United States Supreme Court held that a state law which deprived a property holder of all economically viable use of his property can constitute a regulatory taking of property without just compensation within the meaning of the Fifth Amendment. In *Pacific Access Shoreline Hawaii (PASH) v. Hawaii County Planning Commission*, 79 Haw. 425, 451-52, 903 P.2d 1246, 1272-73

(1995), the Hawaii Supreme Court recognized the holding of *Lucas* with regard to regulatory takings.[6]

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the United States Supreme Court held that, in order to disprove a taking via governmental action, the State must establish that the action both (1) substantially advances legitimate state interests and (2) does not deny an owner of economically viable use of his land. *See also Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987).

Courts are not immune from prohibitions against taking property without just compensation when unpredictable changes in state law operate to produce such a result. *Sotomura v. Hawaii County*, 402 F. Supp. 95 (D. Haw. 1975). By depriving Petitioners of economic viability with regard to their leases and by effecting the same based on a retroactive change in the law without any essential nexus with HHCA § 208(5), the Court's May 24, 1996 Opinion is a taking of property interests without just compensation in violation of the United States Constitution.

A. *Petitioners Possess Property Interests.* As set forth *supra*, Lessee Defendants-Appellees possess property interests in their homestead leases and these interests are substantial enough for constitutional protections, at least under the law prior to the May 24, 1996 Opinion. *Aged Hawaiians v. Hawaiian Homes Commission*, 78 Haw. 192, 891 P.2d 279 (1995).

B. *The Court's May 24, 1996 Opinion Deprived Petitioners Of Economically Viable Uses Of Their Leases.* In determining whether a property holder has been deprived of economically viable uses of his/her property, the Court should, at the very least, look to two independent indicators of such deprivations (either of which would be sufficient): (1) the economic impact of the governmental action on the property holder and (2) the extent to which the governmental action has interfered with investment-backed expectations

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[6]In *PASH*, the Court held that the regulatory taking issue was not yet ripe for review where the Court had remanded the case for further determinations on the regulation in question. However, unlike *PASH*, the Court's May 24, 1996 Opinion remands the instant case to the Circuit Court of the Second Circuit, State of Hawaii, for the entry of summary judgement in favor of Plaintiffs-Appellants. Therefore, *PASH's*, conclusion on the ripeness issue is inapposite and the instant case is ripe for takings analysis.

of the property holder. *See Lucas*, 112 S.Ct. at 2893-94. While either indicator would be sufficient, both of these indicators indicate a deprivation in the instant case.

1. *Economic Impact On Petitioners.* The Court's May 24, 1996 Opinion concluded that the TPAs are void and therefore deprived Petitioners of TPAs as a use with regard to their respective leases. The best evidence of what would happen to Petitioners without the TPAs under current market conditions is that Respondents-Plaintiffs-Appellants have brought this action claiming an inability to compete against large-scale farming operations such as that operated by Licensee Defendants-Appellees. R. 2 at 324, 346; *see also* Opening Brief, filed herein on October 13, 1995, at 3. They have claimed, and therefore admitted, that it is not economically viable to operate a homestead farm competing against such large-scale operations. R. 2 at 324, 346; *see also* Opening Brief, filed herein on October 13, 1995, at 3.

Although Respondents Plaintiffs-Appellants have lamented that all of their competitive problems are due to Respondents Licensee Defendants-Appellees, the economic reality is that Respondents Licensee Defendants-Appellees are but a few of many non-Hawaiian large-scale agribusinesses in this State. Elimination of the TPAs will not cause Respondents Licensee Defendants-Appellees to disappear (they would merely relocate their operations to non-homestead lands), nor would it mitigate the harsh economic competition against other non-Hawaiian agribusinesses. Consequently, it is, at best, speculative that Respondents Plaintiffs-Appellants would be able to achieve any greater degree of success without the TPAs than with the TPAs.

Just as it would be speculative for Respondents-Plaintiffs-Appellants to contend that their problems would be eliminated by invalidation of the TPAs, so to would it be speculative to believe that Petitioners could be economically successful without the TPAs. So understood, Respondents-Plaintiffs-Appellants claims, as well as the Court's May 24, 1996 Opinion, condemn Petitioners to the same economic failures presently alleged by Respondents Plaintiffs-Appellants. Under these circumstances, it is clear that the Court's May 24, 1996 Opinion would work a deprivation of all economically viable uses of Petitioners' leases.

2. *Investment-Backed Expectations.* In the instant case, Petitioners have, in good faith, accepted the DHHL's invitation to sign approved TPAs on forms drafted by the DHHL and ultimately approved by the HHC, with the expectation of a mutually beneficial relationship with Respondents Licensee Defendants-Appellees. *See* Answering Brief at 3-4 and portions of the record cited therein. They have invested, through actions and/or forbearance, time and money into the relationships in reliance on the legal validation of the TPAs by DHHL/HHC. It is clear that, by invalidating the TPAs, the Court's May 24, 1996 Opinion will frustrate the reasonable expectations of Lessee Defendants-Appellees with regard to their leases.

C. *There Is No Essential Nexus Between The Court's May 24, 1996 Opinion And HHCA § 208(5).* In order to establish that governmental action "substantially advances legitimate state interests," the State must establish that (1) there is an "essential nexus" between the governmental action and the state interests and (2) the restriction on the property holder is "roughly proportional" to the impact of the restricted activity on those state interests. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987). Neither burden is met here.

First, the state interest purportedly advanced by the May 24, 1996 Opinion is the HHCA § 208(5)'s proscription against transfers of interest by lessees to non-Hawaiians. However, as set forth *supra*, the TPAs are essentially revocable licenses and do *not* legally transfer any property interests. Therefore, there is no essential nexus between the Court's May 24, 1996 Opinion and HHCA § 208(5). More importantly, the involuntary removal of an economically viable use of HHCA agricultural/pastoral leases cannot be consistent with HHCA's goals of rehabilitation and "betterment" of Native Hawaiians through self-determination. See *Ahuna v. Department Of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982). Perhaps the most troubling aspect of Respondents-Plaintiffs-Appellants' contentions is that they ignore the fact that Petitioners are also Native Hawaiian beneficiaries of the HHCA. This is not simply an intellectual debate on the policies of the State of Hawaii Respondents-Defendants-Appellees in administering the HHCA. Petitioners are real people with real needs who suffer like any other beneficiary from interference with their decisions on the use of their leases, particularly where that interference is through repetitive and stressful litigation.

In the TPAs, Petitioners are merely attempting, with the duly sought approval of DHHL/HHC, to economically rehabilitate themselves through self-determination in the use of their HHCA leases.

Second, the harsh remedy of invalidation of the TPAs is not even roughly proportional to any impact of the TPAs upon Respondents Plaintiffs-Appellants' abilities to compete with non-Hawaiian agribusinesses. As noted *supra*, any such impact is speculative where Licensee Defendants-Appellees are but a few of several non-Hawaiian agribusinesses and, by invalidating the TPAs, the Court is not helping Respondents-Plaintiffs-Appellants; it is merely condemning Petitioners to the same economic failure as Respondents Plaintiffs-Appellants.

Under these circumstances, the Court's May 24, 1996 Opinion cannot meet the requirement of an essential nexus.

D. *The Court's Change In The Law Regarding HHCA § 208(5) And Licenses Amounts To A Judicial Taking.* In *Pacific Access Shoreline Hawaii (PASH) v. Hawaii County Planning Commission*, 79 Haw. 425, 451, 903 P.2d 1246, 1272 (1995), the Hawaii Supreme Court assumed the viability of, but did not expressly recognize, the "judicial taking" doctrine by which a taking occurs when a judicial decision alters property rights such that a change in state law is applied retroactively. (Citing *Chicago Burlington & Quincy RR. Co. v. Chicago*, 166 U.S. 226, 235 (1897), among other authorities).

Prior to the Court's May 24, 1996 Opinion, *Adolpho v. Kealoha*, Civil No. 243 (Haw. 2d Cir. 1960) represented the existing law with regard to the legality of the TPAs. Likewise, as set forth *supra*, the plethora of prior published decisions from Hawaii appellate courts was unanimously of the view that lessees such as Petitioners possess property interests and a license is *not* a transfer of a property interest. Therefore, and regardless if one agrees or disagrees with the Court's May 24, 1996 Opinion, it is undeniable that it represents a change in the law with regard to TPAs and licenses generally under Hawaii property law.

Furthermore, it is also undeniable that the TPAs at issue in this litigation preceded the change in law set forth in the Court's May 24, 1996 Opinion and that, in effect, the Court is retroactively applying the change in law to the circumstances of this case. *Cf. Jenkins v. Cades Schutte Fleming & Wright*, 76 Haw. 115, 119, 869 P.2d 1334, 1338 (1994) (refraining from

retroactive rigid enforcement of HRCP Rule 58 to pending appeals to avoid "unnecessary hardship" to those who have relied on prior case law).

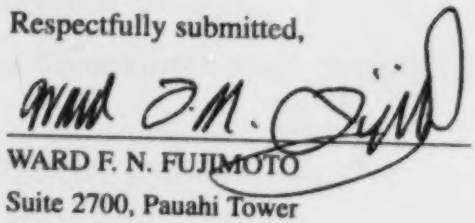
Under these circumstances, it is respectfully submitted that the Court's May 24, 1996 Opinion is a regulatory and/or judicial taking of Petitioners' property rights without just compensation.

CONCLUSION

Based on all the foregoing reasons, arguments, and authorities, it is respectfully submitted that this Petition should be granted and a Writ Of Certiorari should issue to review the Opinion, the Order Denying Reconsideration, and the Notice And Judgment On Appeal of the Supreme Court of the State of Hawaii respectively entered in this proceeding on May 24, 1996, July 8, 1996 and July 10, 1996.

DATED at Honolulu, Hawaii, October 4, 1996.

Respectfully submitted,



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APPENDICES

Appendix "A" –	Hawaii Supreme Court's May 24, 1996 Opinion
Appendix "B" –	Hawaii Supreme Court's July 8, 1996 Order Denying Reconsideration
Appendix "C" –	Hawaii Supreme Court's July 10, 1996 Notice And Judgement On Appeal
Appendix "D" –	Hawaii Second Circuit Court's March 31, 1995 Order
Appendix "E" –	Hawaii Second Circuit Court's July 18, 1995 Judgement
Appendix "F" –	Motion For Reconsideration And Supporting Documents Filed June 3, 1996

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

—OoO—

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, v. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission; ANDREW APANA, NANI BRANDT, DENNIS KAUAHI, ROBERT McFARLAND, ANN NATHANIEL, ALVINA PARK, GEORGE ROBERTSON, and PATRICK SHEEHAN, in their official capacities as members of the Hawaiian Homes Commission; DEPARTMENT OF HAWAIIAN HOME LANDS; HAWAIIAN HOMES COMMISSION; LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, JAMES A. BOSWELL, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN R. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE R. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE P. NEUHART; LARRY JEFTS, WILLIAM F. PFEIL, HAWAIIAN RESEARCH, LTD., GRANT SCHULE, SEIZEN J. BONK, NAFETALAI OTO, FRANCES I. KALELIKANE, HERMAN K. PUAA, LORRAINE M. VINCENT, LILLIAN K. ARINA, RONALD K. ARINA, HENRIETTTA M. DAVIS, MATTHEW K. ADOLPHO, JR., and JULIA KELIIKULI-PETERS, Defendants-Appellees, MARY K. MAMUAD, JOHN R. KAPU, III, TOMI LOU MAMUAD, OR THEIR SUCCESSORS AND ASSIGNS; JOHN DOES 1 THROUGH 100, DOE CORPORATIONS 1 THROUGH 100 and DOE GOVERNMENTAL AGENCIES 1 THROUGH 100, Defendants

NO. 19154

APPEAL FROM THE SECOND CIRCUIT COURT

(Civ. No. 94-0305(3))

May 24, 1996

MOON, C.J., KLEIN, LEVINSON, NARAYAMA, AND RAMIL, JJ.

OPINION OF THE COURT BY KLEIN, J.

APPENDIX "A"

Plaintiffs-Appellants Leiff Koa Bush, Martin D. L. Kahae, Colette Y. Machado, and Kelson "Mac" Poepoe (Appellants) appeal the second circuit court's order granting summary judgment in favor of the Defendants-Appellees and amended judgment dismissing the Appellants' claims with prejudice. The Appellants' complaint sought (1) a declaration that certain third party agreements (TPAs)[1] are contrary to the Hawaiian Homes Commission Act (HHCA)[2] and (2) an injunction barring homestead lessees from entering into such agreements with non-Hawaiians.

I. BACKGROUND

Appellants Bush, Kahae, Poepoe, and Machado are native Hawaiian beneficiaries of the HHCA living on the island of Moloka'i. Bush, Kahae, and Poepoe live on, cultivate crops on, and/or raise livestock on homestead lots in Ho'olehua, Moloka'i under the HHCA.[3] Machado resides in Puko'o,

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[1]A TPA is an, agreement whereby the lessee of an agricultural homestead allows a stranger to the lease to use his or her land for farming or pastoral purposes. As interpreted by the Hawaiian Homes Commission (HHC), these TPAs are permissible, under the Department of Hawaiian Home Lands administrative rules, where formally approved by the HHC. Hawai'i Administrative Rules (HAR) § 10-3-35 (1981) ("No lessee may, without written approval from the commission, enter into any contract, joint venture, agreement or other arrangement of any sort with a third person on lands covered by lessee's lease for the cultivation of crops or the raising of livestock.").

[2]*See* HHCA, 1920, Act of July 9, 1921, c. 42, 42 Stat. 08 (codified as amended at 48 U.S.C. note prec. § 491 (1933) and Haw. Const. art. XII, § 2), *reprinted in* 1 Haw. Rev. Stat. 191 1993) (hereafter the HHCA will be cited as reprinted in Haw. Rev. Stat.).

[3]The [HHCA], Pub. L. No. 67 34, 42 Stat. 108 (1921) . . . . , designated approximately 200,000 acres as "Hawaiian homes lands" and created the Hawaiian Homes Commission to manage them. The commission was authorized to lease small parcels to native Hawaiians for 99 years at nominal rates for agricultural and homestead use. Section 4 of the [Hawai'i] Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) ("Admission Act"), provided, "as a compact with the United States," that the [HHCA] would be "adopted as a provision of the constitution of [Hawai'i], . . . subject to amendment or repeal only with the consent of the United States." Section 5(b) of the Admission Act transferred title to the home lands as well as the ceded lands to the State of Hawai'i. Section 5(f) provided that these lands would "be held by said State as a public trust" for specified purposes, and "their use for any other object shall constitute a breach of trust for which suit may be brought by the United States."

(Footnote continued)

Moloka'i; she is on the Department of Hawaiian Home Lands' (DHHL) Moloka'i waiting list and seeks to obtain a residential and agricultural homestead lot at Ho'olehua.

From 1980 to 1992, Larry Jefts and other non-Hawaiian farmers entered into TPAs with a number of native Hawaiian lessees on Moloka'i whereby the non-Hawaiian third parties contracted to use the lessees' crop acres for farming or pastoral purposes. The native Hawaiian lessees in turn received compensation in the form of monthly payments ranging from $120.00 to $200.00. Jefts and other third party non-Hawaiian farmers thereby contracted for the use of a number of leaseholds, accumulating considerable acreage upon which to facilitate large scale agribusiness. By the time Appellants petitioned to the Hawaiian Homes Commission (HHC) to protest these agreements, Jefts had amassed close to 495 acres, which included approximately thirteen different leaseholds.

On May 19, 1992, the HHC approved various TPAs. Although the Appellants were not present during these proceedings,[4] they did participate in a June 30, 1992 proceeding during which the HHC voted to reaffirm the legality of the TPAs and deny Bush and Kahae's requests for a contested case hearing. In a previous case, we held that the courts lacked subject matter jurisdiction under Hawai'i Revised Statutes (HRS) § 91-14(a) (1993) to review Bush and Kahae's claims. *Bush v. Hawaiian Homes Comm'n [Bush I]*, 76 Hawai'i 128, 136-37, 870 P.2d 1272, 1281-82 (1994). However, we observed that the "Appellants are not barred from contesting the Commission's actions through alternative means[.]" *Id.* at 137, 870 P.2d at 1281.

(Footnote continued)

Han v. United States Dept. of Justice, 45 F.3d 333, 335 (9th Cir. 1995). *See also Pele Defense Fund v. Paty*, 73 Haw. 578, 5B5-86, 837 P.2d 1247, 1253-54 (1992), *cert. denied*, S07 U.S. 918 (1993) (providing a brief description of the "ceded lands" and listing the five purposes identified in section 5(f) of the Admission Act); *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 159-64, 737 P.2d 446, 449-52, *cert. denied*, 484 U.S. 898 (1987) (describing the evolution of the "ceded lands" in greater detail).

[4] Kahae and his family appeared before the HHC on December 18, 1987 to challenge the validity of the TPAs. On April 28, 1992, the HHC deferred action on twenty one written requests by homestead lessees for approval of their TPAs. The HHC denied the Appellants' request to postpone consideration of the TPAs further despite the fact that the Appellants' attorney could not attend the May 19, 1992 meeting held on Kaua'i.

On May 4, 1994, the Appellants filed the present action under 42 U.S.C. § 1983 (1988),[3] challenging the legality of the twenty-one TPAs approved by the Commission in 1992 and other "de facto" TPAs that had not yet been submitted to the Commission for approval. The complaint named the chairperson and commissioners of the HHC, the HHC and the DHHL (collectively "State Appellees"), thirty native Hawaiian lessees of homestead lots (Lessee-Appellees), and six persons who entered into TPAs granting them use of agricultural homestead lots (Third-Party-Appellees) .

The circuit court dismissed the Appellants' claims against the State Appellees on the basis of sovereign Immunity and parallel federal litigation raising identical challenges to the TPAs. *See Han v. United States Dep't of Justice*, 824 F. Supp. 1480, 1489 (D. Haw. 1993), aff'd, 45 F.3d 333 (9th Cir. 1995). The court also granted the State Appellees' motion for summary judgment and the Lessee-Appellees and Third-PartyAppellees' joinders therein. After we issued a June 13, 1995 order dismissing the Appellants appeal as premature, *see Jenkins v. Cades Schutte Fleminq & Wriqht*, 76 Hawai'i 115, 869 P.2d 1334 (1994), the circuit court entered an ex parte order amending its judgment and dismissing "with prejudice" all of the claims against all of the defendants.

II. STANDARD OF REVIEW

"We review the circuit court's award of summary judgment de novo under the same standard applied by the circuit court." *Maguire v. Hilton Hotels Corp.*, 79 Hawai'i 110, 112, 899 P.2d 393, 395 (1995). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

The standard of review for statutory construction is well-established.

The interpretation of a statute is a question of law which this court

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[3] Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or cases to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> reviews *de novo*. In addition, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.

State v. Baron, 80 Hawai'i 107, 113, 905 P.2d 613, 619, *reconsideration granted in part and denied in part*, 80 Hawai'i 187, 907 P.2d 773 (1995) (citation and brackets omitted).

III. DISCUSSION

The Appellants assert that their claims are not barred under the doctrine of sovereign immunity and that the HHC violated its trust duties by failing to represent the interests of those Hawaiians who want to become economically self-sufficient on homestead land. The Appellees counter that: 1) the Appellants' claims were properly dismissed on sovereign immunity and justifiability grounds; 2) the Appellants did not have standing; and 3) the TPAs do not violate the HHCA or the State's implied trust duties under the HHCA.[6]

A. Jurisdictional Challenges

1. *Standing*

Relying upon *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Appellees argue that the Appellants do not have standing because they failed to show how a favorable ruling would redress their harm and neglected to submit proof tracing any losses to the specific actions of third parties. This argument is without merit.

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[6] For convenience, this opinion treats the Appellees collectively, except where otherwise indicated. The Third Party Appellees concur with the State Appellees' arguments; the Lessee Appellees add that (1) the Appellants' claims are barred by the doctrine of unclean hands, and (2) the circuit court did not abuse its discretion in awarding costs for computer assisted legal research (CALR) charges. The Lessee-Appellees' argument based upon the willingness of at least some of the Appellants to enter into similar TPAs with a native Hawaiian organization is without merit under the express language of the HHCA. *Cf. Naliielua v. Hawai'i*, 795 F. Supp. 1009 (D. Haw. 1990), *aff'd*, 940 F.2d 1535 (9th Cir. 1991). Based on our holding in this case, we need not reach the second argument. Nevertheless, because the issue of costs may arise in subsequent proceedings, we observe that the Intermediate Court of Appeals recently rejected EOLALIA as a component of costs. *Biornen v. State Farm Fire and Casualty Co.*, 81 Hawai'i 105, 107-09, 912 P.2d 602, 604-06 (App. 1996). *See also Bergmann v. Boyce*, 856 P.2d 560, 566-67 (Nev. 1993).

We did not expressly decide the question of standing in Bush I.[7] Nevertheless, in *Han v. United States Dept. of Justice*, 824 F. Supp. 1480 (D. Haw. 1993), *aff'd*, 45 F.3d 333 (9th Cir. 1995), the United States District Court for the District of Hawai'i found that plaintiffs who brought a substantially similar claim had standing to challenge these TPAs. 824 F. Supp. at 1487. Moreover, we have consistently held that standing barriers should be lowered in cases of public interest under our jurisdiction. *See, e.g., Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 204-05, 891 P.2d 279, 291-92 ("federal justifiability standards are inapplicable in state court declaratory judgment actions involving matters of great public importance"), *cert. denied*, 116 S. Ct. 77 (1995); *Pele Defense Fund v. Paty*, 73 Haw. 578, 592, 837 P.2d 1247, 1257 (1992), *cert. denied*, 507 U.S. 918 (1993); *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 176, 623 P.2d 431, 439 (1981) (the "touchstone" of our standing requirements is the "needs of justice"). *See also Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 434 n.15, 903 P.2d 1246, 1255 n.13 (1995) (recognizing, with respect to native Hawaiian issues, "the need to avoid foreclosing challenges to administrative determinations through restrictive applications of standing requirements") (internal quotations, brackets, and citations omitted), *cert. denied*, ____ U.S. ____ (1996).

As a general rule, whether a party has standing is measured by the three part "injury in fact" test: (1) he or she has suffered an actual or threatened injury as a result of the defendant's wrongful conduct, (2) the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for a plaintiff's injury. *Pele*, 73 Haw. at 594, 837 P.2d at 1258 (holding that the plaintiffs had standing to bring a declaratory judgment action asserting, inter alia, that the State breached its trust duties under section 5(f) of the Admission Act); *see also Kaapu v. Aloha Tower Dev. Corp.*,

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[7] In *Bush I*, we made the suggestion that

> [the] Appellants may well have been aggrieved by the (HHC's) decision to approve the TPAs, inasmuch as the approved TPAs may have enabled the formation of agribusinesses which in turn unduly burdened Appellants' farming practice. Thus, Appellants could claim they were especially, personally and adversely affected" by the administrative decision.

76 Hawai'i at 134, 870 P.2d at 1278 (citations omitted).

74 Haw. 365, 391, 846 P.2d 882, 893 (1993) (applying the "standard rules governing standing to sue" in the absence of applicable statutory language establishing the right to sue as a "private attorney general"). The Appellants have adequately established grounds for standing: (1) the HHC's approval of the TPAs has injured trust beneficiaries by allowing non-Hawaiian third parties to acquire large parcels of homestead lots and unduly burden the Appellants' commercial farming interests; (2) these injuries are traceable to the HHC's approval of the TPAs; and (3) invalidation of the TPAs would allow the Appellants to pursue commercially viable farming efforts.

Thus, we hold that the Appellants have standing in the instant case to challenge the HHC's decision to approve the TPAs between the Lessees-Appellees and the Third-Party-Appellees.

2. *Claim Preclusion/Res Judicata*

The Appellees next contend that the Appellants' claims are precluded by the litigation in *Han, supra*. We have consistently recognized that:

> The judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.

Morneau v. Stark Enters., Ltd., 56 Haw . 420, 422-23, 539 P.2d 472, 474-75 (1975) (quoting *Ellis v. Crockett*, 51 Haw. 45, 55, 451 P.2d 814, 822 (1969) (quoting *In re Bishop Estate*, 36 Haw. 403, 416 (1943)).

In *Morneau*, we also commented on the implications of the doctrine of collateral estoppel:

> Collateral estoppel is an aspect of *res judicata* which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies...Collateral estoppel also precludes relitigation of facts or issues previously determined by one not a party in a prior suit against one who was a party in that suit and who himself raised and litigated the fact or issue.

> 56 Haw. at 423, 539 P.2d at 475 (citations omitted). These principles are tempered only by the prerequisite that a plaintiff have a full and fair opportunity to litigate the relevant issues. *See Morneau*, 56 Haw. at 421-22, 539 P.2d at 474; *see also, Allen v. Mccurry*, 449 U.S. 90, 95 (1980) (noting a long recognized exception that "collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the issue in the earlier case").

Pele, 73 Haw. at 599-600, 837 P.2d at 1261 (some citations omitted).

In *Morneau*, this court established a three-pronged test to determine whether res judicata (or collateral estoppel as an included doctrine) bars relitigation of an issue. Res judicata will bar relitigation where: 1) "the issue decided in the prior adjudication [is] identical with the one presented in the action in question"; 2) "there [was] a final judgment on the merits"; and 3) "the party against whom [res judicata] is asserted [was] a party or in privity with a party to the prior adjudication[.]" *Morneau*, 56 Haw. at 424, 539 P.2d at 475. Although *Han* involved the same subject matter, i.e., the validity of the TPAs between the Lessee-Appellees and the Third-Party-Appellees, the *Morneau* test has not been met in the instant case.

First, the Appellants' allegation that the TPAs violate the HHCA were not addressed in *Han*. 45 F.3d at 339 ("claims under the [HHCA]... arise exclusively under state law" and, thus, do not give rise to federal court jurisdiction). Second, *Han* did not reach the merits of the dispute. The state law claims were dismissed for lack of subject matter jurisdiction, which is not an adjudication on the merits. *See* 18 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4436, at 339 (1981) ("Unless the court in its order for dismissal otherwise specifies, the dismissal under this subdivision and any dismissal not provided for under this rule *other than dismissal for lack of jurisdiction* or for improper venue or for failure to join a party operates as an adjudication on the merits.") (emphasis added). Third, the instant case does not involve the same parties or privies as *Han*.

The Appellees argue, nevertheless, that *Han* should be given preclusive effect because Bush and Kahae participated as amici in the appeal to the United States Court of Appeals for the Ninth Circuit in *Han*.

> As the preclusive effects of judgments have expanded to include nonparties more and more situations, however, it has come to be recognized that the privity label simply expresses a conclusion that preclusion is proper. As to privity, current decisions look directly to the reasons for holding a person bound by a judgment.

Wright, Miller & Cooper, *supra*, § 4449, at 418-19 and Supp. (1955) at 331. For example, preclusion is fair in circumstances where the nonparty and party had the same practical opportunity to control the course of the proceedings. *Id.* § 4451, at 429-30. Absent a showing that the Appellants controlled the *Han* litigation, the mere fact that Bush and Kahae filed an amicus brief in that case is insufficient to give *Han* preclusive effect. *See Munoz v. County of Imperial*, 667 F.2d 811, 816 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982).

Preclusion may also be appropriate where the party in the previous action was acting in a representative capacity for the current party. *See Kauhane v. Acutron*, 71 Haw. 458, 464, 795 P.2d 276, 279 (1990). However, "[s]everal important rules limit the extent of preclusion by representation. The most obvious [rule is] that the representative must have been appointed by a valid procedure." Wright, Miller & Cooper, *supra*, S 4454, at 463. There is no evidence in the record that any of the plaintiffs in *Han* was acting as a representative of any of the Appellants in the instant case, much less was appointed as a representative by a valid procedure.

For the foregoing reasons, we hold that *Han* should not be given preclusive effect in the instant case.

3. *Sovereign Immunity*

One of the focal points of this appeal is whether the Appellants' claims are barred by sovereign immunity. In *Pele*, we observed that federal immunity principles under the eleventh amendment to the United States Constitution are "relevant to our own principles of sovereign immunity." 73 Haw. at 606, 837 P.2d at 1264. In previous cases, we have held that "the sovereign State is immune from suit for money damages, except where there has been a 'clear relinquishment' of immunity and the State has consented to be sued." *Id.* at 607, 837 P.2d at 1265 (citing *Washington v. Fireman's Fund Ins. Co.*, 68 Haw. 192, 198, 708 P.2d 129, 134 (1985), *cert. denied*, 476 U.S. 1169 (1986)). This exception to sovereign immunity can be traced

to *Ex parte Young*, 209 U.S. 123 (1908). Accordingly, we have adopted the rule in *Young*, which:

> makes an important distinction between prospective and retrospective relief. If the relief sought against a state official is prospective in nature, then the relief may be allowed regardless of the state's sovereign immunity. This is true "even though accompanied by a substantial ancillary effect on the state treasury." However, relief that is "tantamount to an award of damages for a past violation of...law, even though styled as something else," is barred by sovereign immunity.

Pele, 73 Haw. at 609-10, 837 P.2d at 1266 (footnotes and citations omitted).

"Simply asking for injunctive relief and not damages *does not* clear the path for suit. The [United States] Supreme Court has recognized that the difference between retrospective and prospective relief 'will not in many instances be that between day and night.'" *Id.* at 610, 837 P.2d at 1266 (emphasis in original) (quoting *Ulaleo v. Paty*, 902 F.2d 1395, 1399 (9th Cir. 1990)). In *Pele*, an organization comprised of native Hawaiian beneficiaries of the ceded lands trust,[8] among others, sought to nullify a land exchange agreement between the State and a private estate via imposition of a constructive trust. We held that this request was, "in effect, a request for compensation for the past actions of [state officials]" because it was

> "essentially equivalent" to a nullification of the exchange and the return of the exchanged lands to the trust res. The effect on the state treasury would be direct and unavoidable, rather than ancillary, because imposing a constructive trust on lands now held by [the purchaser] would require that the State compensate [the purchaser for its property.

Id. at 611, 837 P.2d at 1267.

Unlike *Pele*, there is no direct and unavoidable effect on the state treasury In the instant case. The Appellants alleged prospective (i.e., continuing and ongoing) violations of HHCA § 208 with regard to existing TPAs as well as

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[8] *See* Hawai'i Admission Act § 5(f), Pub. L. No. 86 3, 73 Stat. 4, 6 (1959) (providing that lands granted to the State under section 5(b) of the Admission Act "shall be held by said State as a public trust"); Hawai'i Constitution, art. XII, § 4 (1978) (providing that these lands "shall be held by the State as a public trust for native Hawaiians and the general public").

those that have not yet been approved by the HHC.[9] They sought declaratory and injunctive relief that would void existing TPAs and de facto TPAs and enjoin the HHC from approving future TPAs. As distinguished from the substance of the claim for relief in Pele, an injunction voiding the TPAs would not render the State Appellees liable to the contracting parties because each TPA contains an indemnity provision explicitly protecting the DHHL from any liability:

> Third Party and Lessee shall indemnify and defend Department, its Officers, agents and employees from and against all losses, damages, costs, expenses, attorney's fee and other sums which Department may incur, pay or be obligated to pay on account of any demand, claim or suit for any loss of damage to property, property right or injury or death to any person, arising out of, caused by or in any way connected with the implementation, use, or reliance upon this Third Party Agreement.

In other words, the Appellants' requested relief is not "a request for compensation for the past action" of the HHC's members. *Pele*, 73 Haw. at 611, 837 P.2d at 1267.

Thus, we hold that sovereign immunity does not bar the Appellants claims in the instant case.[10]

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[9]We decline to adopt the federal courts' narrow view that a claim for relief based on past illegal action is necessarily "retrospective." *See Han*, 824 F. Supp. at 1489, *aff'd*, 43 F.3d at 338. As suggested by counsel for the Appellants during oral argument, such an interpretation would force potential claimants to discern the potential impact of proposed agency action, ascertain the threat of injury, and acquire an attorney to draft a complaint and file suit (subject to sanctions under Hawai'i Rules of Civil Procedure (HRCP) Rule 11), all within the six days required for notice of administrative proceedings under HRS § 92-7(b) (1993). Rather than imposing such an onerous burden on potential claimants, the crucial inquiry under our sovereign immunity principles is whether the relief sought for a past violation of law is "tantamount to an award of dam,ages" or would severely have an "ancillary" effect on the state treasury. Pele, 73 Haw. at 609-10, 837 P.2d at 1266 (citing *Papasan v. Allain*, 478 U.S. 265, 278 (1985)).

[10]As a result of this holding, we need not decide whether the State expressly waived immunity from suits arising out of alleged violations of the HHCA in HRS chapter 661 or 673.

B. *Violations of the HHCA*

The Appellants allege that the TPAs violate HHCA § 208(5) because that section (1) prohibits lessees from transferring or holding their leasehold for the benefit of anyone except a native Hawaiian and (2) prohibits lessees from subleasing their parcels:

> *The lessee shall not in any manner transfer to, or otherwise hold for the benefit of, any other person or group of persons or organizations of any kind, except native Hawaiians or Hawaiians*, and then only upon the approval of the department, or agree so to transfer, or otherwise hold, the person's interest in the tract. Such interest shall not, except in pursuance of such a transfer to or holding for or agreement with a native Hawaiian or Hawaiians approved by the department, or for any indebtedness due the department or for taxes, or for any other indebtedness the payment of which has been assured by the department, including loans from other agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon (court process. *The lessee shall not sublet the person's interest in the tract or improvements thereon.*

1 Haw. Rev. Stat. 167, 183-84 (1953) (HHCA, 1920, § 208(5)) (emphasis added).

The Appellees contend that the TPAs are "mere licenses,[11] which do not

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[11]A license in real property is defined as a personal, revocable, and unassignable privilege, conferred either by writing or parole, to do one or more acts on land without possessing any interest therein...[A] license is distinguishable from a lease in that a lease conveys an interest in land and transfers possession[.]

25 Am. Jur. 2d *Easements and Licenses* § 125 at 527-28 (1966). *See also Black's Law Dictionary* 919-20 (6th ed. 1990) (A "license" is a personal privilege to do some particular act or series of acts on land without possessing any estate or interest therein, and is ordinarily revocable at the will of the licensor and is not assignable."). By contrast, Black's law Dictionary defines a "sublease" as

> [a] lease executed by the lessee of land or premises to a third person, conveying the same interest which the lessee enjoys, but for a shorter term than that which the lessee holds (as compared to assignment, where the lessee transfers the entire unexpired term of the leasehold to a third party). *Transaction whereby tenant grants interests in leased premises less than his own, or reserves to himself a reversionary interest in term.*

Id. at 1425 (emphasis added).

create property interests in the land.[12] In support of their argument, the Appellees cite:

1) the absence of a definite term in the TPAs; 2) the fact that the TPAs are revocable at the will of the lessee; 3) the fact that the lessee has joint use of the property at all times; and 4) the lessees' right to recall the land for their exclusive use at any time and for any reason.[13] See also AdolPho v. Kealoha,

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[12] The TPAs also contain a provision disclaiming any intent to enter into a sublease or any kind of agreement granting a property interest to the Third-Party-Appellees:

> Lessee and Third Party agree that this agreement is not, nor is it intended to be, a sublease or assignment or other transfer of Lessee's possessory interest in the permit area and that no interest whatsoever in the permit area land is hereby created on behalf of Third Party and that this Agreement is specifically revocable at the will of the Lessee.

(Emphasis added).

[13] The Appellees make further reference to the history of "Block Planting Agreements" between pineapple companies and homesteaders beginning shortly after enactment of the HHCA in 1920. In 1924, the Attorney General's Office (AG) opined that "[a] lessee can make a contract of cultivation and sale merely with a pineapple company but he cannot in any manner transfer, mortgage, pledge, or otherwise hold for the benefit of such a company, nor for any other person, excepting a native Hawaiian." 1923-24 Op. Att'y gen. at 544 (Att'y Gen. Op. No. 1168). Two years later, the AG interpreted *Territory v. Tsunekichi*, 23 Haw. 813 (1917) to permit "cropping contracts" — provided that such agreements merely granted liens, rather than "mortgages" upon the crops, with respect to money advanced by the pineapple company for crop production – because the contracts were "apparently favorable to the lessee under the [HHCA.]" 1925-26 Op. Att'y Gen. 591, 593-94 (Att'y Gen. Op. No. 1388). Nevertheless, in response to a resolution of the territorial Senate, *see* Department Communication No. 44 (Oct. 21, 1941) (on, file with the AG), the AG overruled its 1926 opinion fifteen years later:

> A provision in a contract between homesteaders on Hawaiian home lands and a pineapple company giving the company a lien on growing crops and fruit together with the right to enter upon the land and to cultivate and harvest the crops in case of default is repugnant to Section 20B(5) of the Hawaiian Homes Commission Act, 1920, as amended.

Att'y Gen. Op. No. 1786 (Oct. 21, 1941). In 1955, after the pineapple companies modified the offensive lien provision so that it only applied after harvesting, the AG issued another opinion observing that "the U.S. Congress impliedly authorized 'collective contracts and programs' because of certain amendments to Secs. 209(1) and 216 of the [HHCA] adopted In 1937, *provided that any such collective contracts and programs...must meet the test set forth in Section 208(5) which*

(Footnote continued)

Civ. No. 243 (Haw. 2d Cir. 1960).[14] We reject the Appellees' contentions.

Although we discussed some of the relevant agreements in Bush I, we did not effect a definitive interpretation of these TPAs:

> The TPAs can only be characterized as "subleases, as referred to in § 208(5) of the HHCA, "transfers of homestead leases," as defined in HAR § 10-3-36, or "[c]ontracts covering lease lands," pursuant to HAR § 10-3-35. Regardless of which characterization the Commission utilized, the [homestead lessees' interest in entering into their] TPAs cannot be considered "property" interests because a sublease, transfer, or contract covering leased lands does not

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(Footnote continued)

section was re-enacted under the same amendment.'" Att'y Gen. Op. No. 55-20 at 5-6 (Mar. 29, 1955) (quoting Att'y Gen. Op. No. 1786) (emphasis added). *See also* 1 Haw. Rev. Stat. 167, 211 (1993) (HHCA § 209(a), as amended) (referring to "any collective contract or program"); 1 Haw. Rev. Stat. 167, 222 (HHCA § 216(c), as amended) (same). The AG ultimately concluded that "Congress must have considered the then existing cooperative block planting agreements in adopting its amendments to Secs. 209 and 216 of the HCCA.] Att'y Gen. Op. No. 55-20 at 10. This conclusion was based in part, on the AG's inference that the territorial legislature "had in mind the block planting agreements[.]" *Id.* at 8-9 (citing portions of Special Comm. Rep. No. 1, in 1937 House Journal at 401-547); 1937 House Journal at 510, 514 (quoting from a University of Hawai'i survey prepared response to a concurrent resolution of the territorial legislature, in which the author discusses the "block system," and observes that "there is no alternative..., [e]ither large plantings must be made or pineapples will go out"). ***But see*** 1537 House Journal at 518-19 discussing the formation of cooperative associations among homesteaders). In any event, the AG emphasized that "each successive [AG] who has rendered an opinion on this subject has felt that the legality of the [Moloka'i] homestead pineapple contracts should be conclusively determined in a court of law or by...appropriate amendments to the [HHCA]." Att'y Gen. Op. No. 55-20 at 10.

[14]Although the record in the instant case contains a copy of the second circuit court's *Adolpho* decision, which the State Appellees introduced as an exhibit, the Answering Brief of the State Appellees recognizes that we are not bound by that decision. In *Adolpho*, the second circuit court determined that "Block Planting Agreements" between a pineapple company and multiple Hawaiian homestead lessees did not violate HHCA § 208(5) because these agreements only gave the company a "right to go upon the land...as the agent of the planters...and [did not give the company any] rights in the crop until it is harvested, that is, after severance." See slip op. at 9-18 (distinguishing *In re Henderson*, 21 Haw. 104, 116-17 (1912)).

> constitute a property interest pursuant to the relevant sections of the HHCA and the HAR. Thus, the right to sublease, transfer homestead leases, or enter into a contract covering the leases is not "substantial enough to require agency hearings prior to [the Commission's decision) . "...Accordingly, because the subject matter of the underlying hearing did not involve the homestead lessees' property" interests, the hearing that transpired was not "required by law" and therefore was not a contested case as defined by HRS § 91-1(5) (1985).

Bush I, 76 Hawai'i at 136, 870 P. 2d at 1280 (footnotes and citation omitted).[15] In other words, we only determined that due process does not require a hearing on a request for approval of a TPA because such proceedings do not involve the potential deprivation of any "property interest" held by the lessee under the HHCA and HAR.

Under HHCA § 208(5), a Hawaiian homestead lessee does not possess the right to "transfer to, or otherwise hold for the benefit of, any another person..., except a native Hawaiian or Hawaiians, and then only upon the approval of the department, ...[or to] sublet the [lessee's] interest in the tract or improvements thereon." Pursuant to HAR § 10-3-35, Hawaiian homestead lessees are prohibited from "enter[ing] into any contract, joint venture, agreement or other arrangement of any sort with a third person on lands covered by the lessee's lease for the cultivation of crops or the raising of livestock" without the approval of the HHC. Finally, HAR § 10-3-36 gives Hawaiian homestead lessees who have held such lease for at least seven years a limited right to transfer their leases to other qualified individuals; the

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[15]HAR § 10 3 35 is quoted *supra* at note 1. HAR § 10 3 36 provides:

> *Transfer of homestead leases.* Requests for transfers will be considered for approval only if the lessee has held such lease for a period of at least seven years, unless the department, in its considered opinion, finds that an emergency exists which makes transfer imperative. A lessee may transfer the leasehold to any individual who qualifies under the Act, and is at least twenty-one years old. The transferee must immediately occupy the residence lot or use or cultivate the agricultural or pastoral lot. Failure to occupy or use such lot within sixty days from date of transfer shall constitute grounds for cancellation of such lease. A transferee may own an interest in non-Hawaiian home lands real property, regardless of degree of ownership.

HHC also has discretion to allow such transfers if an emergency arises before the lessee has held his or her lease for seven years. Accordingly, it is clear that, compared with ordinary leaseholders, Hawaiian homestead lessees do not possess all of the "sticks in the bundle of rights commonly characterized as property[.]" *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

Our determination in *Bush I* that Hawaiian homestead lessees do not have a property interest substantial enough for due process to require hearings on requests for HHC approval of proposed TPAs, however, is not the equivalent of a finding that TPAs approved by the HHC do not convey property interests. *See, e.g., Miller v. Department of Transp.*, 3 Haw. App. 91, 93, 641 P.2d 991, 992 (1982) (citing *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, *rehearing denied*, 368 U.S. 869 (1961)).[16] Nevertheless, the question remains whether the TPAs in the instant case violate the HHCA.

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[16] "Where it has been possible to characterize that private interest (perhaps in oversimplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required." 367 U.S. at 895 (citing, inter alia, *Knauff v. Shaughnessy*, 338 U.S. 537 (1950), and *Jay v. Boyd*, § 351 U.S. 345 (1956)). *McElroy* involved the United States Navy's traditionally unfettered control when acting as a proprietor managing the internal operation of an important military establishment – *viz.*, retracting the security clearance of a cook who worked at a private concessionaire in the Naval Gun Factory. *Knauff* involved the discretionary power of the Attorney General and the Secretary of State to deny admission of aliens into the United States. *Boyd* involved the Attorney General's discretionary power to suspend deportation based on confidential information not disclosed to the alien.

In each of the above cases, the Supreme Court held that due process did not require notice and hearing prior to deprivation of the particular privilege at stake. HHCA § 208(5) grants the HHC *limited* discretionary power regarding arrangements between homestead lessees and other native Hawaiians that constitute a "transfer to," or a holding of the lessees' interests "for the benefit of," another person or group of persons. This statutory authority is not as broad as the "Executive's plenary power" discussed in *McElroy, supra*, but a similar due process analysis applies where an agency's discretionary power is involved. *See Knauff, supra; Boyd, supra*. Thus, it appears that constitutional due process does not require the HHC to provide notice and hearing on applications for approval of TPAs between homestead lessees and other native Hawaiians. However, for the reasons discussed *infra*, it can hardly be said that the rights conveyed by the lessee under TPAs that have been approved by the HHC, *see, e.g.*, HHCA § 208(5) (excepting approved transfers to, or holding for the benefit of, native Hawaiians from the general prohibition against "attachment, levy, or sale upon court process" of the lessees' interest), do not amount to "interests in land."

Although there is no authoritative case law in this jurisdiction interpreting HHCA § 208(5), we can derive some guidance from the Supreme Court of the Territory of Hawai'i. In *Territory v. Tsunekichi*, 23 Haw. 813 (1917), the court decided a reserved question from the circuit court involving a lessee who had been charged with, inter alia, unlawfully removing sugar cane from his homestead.[17] The lessee allowed a milling company to enter his homestead and, for a fee, remove sugar cane growing thereon that was subject to a purported mortgage instrument between the lessee and a sugar company. The lessee had agreed: 1) to sell to the sugar company such cane as "may mature upon said lands during the term of two years" at a specified price; 2) that the sugar company would have the right to deduct any advances made to the lessee; and 3) in case of default by the lessee, that the sugar company would have the right to enter upon the land and cultivate and harvest the crops as "security" for any such advances. The *Tsunekichi* court considered the agreement to be "an executory contract" under which the sugar company could, in case of breach by the lessee, pursue three alternative remedies: 1) cancellation of the agreement; 2) entrance upon the land to take possession of any crops growing thereon, and harvest the same as provided in the contract; or 3) maintenance of an action at law seeking damages for breach of contract. *Id.* at 820-21. The court observed that this agreement did not reflect an intent to transfer title and, therefore, held that it did not constitute an illegal mortgage of the lessee's interest. *Id.* at 821. *Cf. In re Henderson*, 21 Haw.

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[17] The lessee held the land under a 999 year homesteading program established by the Republic of Hawai'i that is distinct from the HHCA but contains comparable provisions. *Compare* HHCA § 208(5) *with* Rev. Laws Haw. § 326(4), at 202 (1905) (providing that the lessee "shall not assign or sublet, conditionally or otherwise, his interest or any part thereof, under the freehold agreement, without the written consent of the commissioner of public lands indorsed on such agreement"). In *Tsunekichi*, the lessee was charged with fraudulent removal or concealment of mortgaged personalty:

> Whoever with a fraudulent intent to place personal property which is subject to a mortgage, beyond the control of the mortgagee, removes or conceals or aids or abets in the removing or concealing the same, and a mortgagor of such property who assents to such removal or concealment, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year.

Rev. Laws Haw. § 3998, at 1421 (1915).

104, 114-17 (1912).[18] Accordingly, the court advised the circuit court that it should grant the lessee's motion for a directed verdict of acquittal on the charge of fraudulent removal of mortgaged personality. *Tsunekichi*, 23 Haw. at 821.

Although the leasing program at issue in Tsunekichi and Henderson is distinguishable from the HHCA, see supra note 17, these cases demonstrate that the nature of an agreement between homestead lessees and third parties must be examined closely to determine whether it complies with statutory restrictions.

> If the right to occupy any distinct and separate part of the premises is given a third person, this may constitute a subletting of such part, notwithstanding that the paper signed by the parties names it a "license," *since the court will look beyond the form of the transaction to determine its true import.*

49 Am. Jur. 2d *Landlord and Tenant* § 1161 at 903 (1995) (emphasis added). *See also Kapiolani Park Preservation Soc'y v. City and County of Honolulu*, 69 Haw. 569, 578-79, 751 P.2d 1022, 1029 (1988) (noting, in the analysis of whether an agreement is a sublease or a license, that this court is not limited by the "name given [the agreement] by [the parties]").

Additional authority exists for construing a "mere license" as an "interest in land":

> It is almost too obvious to deserve statement that parties who manifestly desire to do so can effectively create a privilege in A to enter upon and to use land possessed by B, so long as B fails to cancel the privilege. In any such case, it is immaterial whether the initial consent by B is explicit or inferred, whether the consent was oral, written, sealed, recorded, attested or lacking in some of these formalities. The intended privilege is revocable at the will of the servient owner in every such case, as the parties intended that it should be.

---

[18]In *Henderson*, the territorial Supreme Court reversed a circuit court's order directing issuance of a land patent to the lessee because, inter alia, he had *illegally assigned a portion of his interest in the land* to a sugar company by entering into an agreement allowing the latter to "enter into possession of the land and to grow, cultivate and harvest thereon crops of cane for the term of four years, or indefinitely...[for a fee]." *Id.* at 116-17.

What has been created is similar in many ways to an easement. It differs in one crucial particular, namely, that its duration is at the will of the servient owner. A revocable relationship of this sort is of great importance in the privilege implied in favor of social and business callers to enter on the land of the callee, *i.e.*, to do an act which, but for the license, would be a trespass. *The common practice of calling this relationship a "mere license" is unfortunate.* It is the most unmistakable core type of license. No adjective is needed. The use of one is an invitation to confusion. It has been called by Conrad the "grandfather" of all licenses.

Such a revocable privilege is an "interest in land" as that term has been defined in Section 5 of the Restatement of Property[19]; and as the term is used in this Treatise. This does not mean that the revocable privilege should be treated as a substantial interest in land, or (2) that it is such an interest in land as comes within statutory requirements of a writing or of a seal for its creation or (3) that the

---

[19]As cited by Professor Powell, the Restatement of Property also defines a license as an "interest in land," and provides:

§ 512. DEFINITION OF "LICENSE."

The term "license," as used in this Chapter, denotes an interest in land in the possession of another which

(a) entitles the owner of the interest to a use of the land, and

(b) arises from the consent of the one whose interest in the land is affected thereby, and

(c) is not incident to an estate in the land, and

(d) is not an easement.

Comment:

. . . .

c. *Interest in land.* A license, as the legal consequence of a consent given to one person to use the land of another, includes always a privilege and, perhaps, other legal relations with respect to the land in question. A privilege to use certain land constitutes an interest in that land. (See § 5, particularly Comment c.) All "licenses," as the term is used in this Chapter, are "interests in land" as that phrase is used in the Restatement of Property. This does not mean that they are "interests in land" in every use of that phrase. For example, it does not mean that they are necessarily "interests in land" as that phrase is used in the Statute of Frauds.

Restatement of the Law of Property, § 512 at 3115-16 (1944).

> licensee is entitled to compensation on a taking of the servient parcel by condemnation. *The evanescent, fleeting, revocable character of the interest justifies a denial of treatments accorded to more substantial interests in land but does not justify a denial of its character as an interest in land, while it lasts. So long as it continues, a license derogates from the completeness of the servient owner's ownership and this requires it[s] recognition as an "interest in land."*

2 R. Powell and P. Rohan, Powell on Real Property, § 34.25 at 34-298 through 34-301 (1995) (emphasis added and footnotes omitted. See also McCandless v. John Ii Estate, Ltd., 11 Haw. 777, 788-89 (1899) ("If the instrument in question passes to the plaintiff a right to use the land for a definite term for a specific purpose,...it creates an 'interest' in the land, and therefore it does not create a license revocable at the will of the licensor[.]").

With the above precepts in mind, we observe that the TPAs in the instant case address specific parcels of property and are arguably for fixed terms because they require fixed notification periods for revocation.[20] Although they purport to be terminable at will and preserve concurrent use by the lessees and the third parties, the TPAs transfer at least a portion of the lessees' extant interests in their homesteads. As compared, for example, with a legitimate employment contract, these particular TPAs provide a right of entry (allowing non-Hawaiian third parties to cultivate crops and raise livestock on homestead lands) that is repugnant to HHCA § 208(5).[21]

---

[20]Each of the twenty three TPAs at issue in this case contains a revocation clause either identical or substantially similar to the following:

> Term of use. Notwithstanding any other provisions herein, this Agreement shall be revocable at the will of the lessee upon ____ days' notice. Lessee may recall its land or cancel this agreement at any time and for any reason.

In the eleven of the TPAs, the parties entered the number "365" (three hundred and sixty-five) in the blank space, indicating that 365 days' prior notice was required before the lessee could revoke the TPA. The parties entered "180" (one hundred eighty) days in three additional TPAs and "120" (one hundred twenty) in four other TPAs. In two further TPAs, the parties entered "90" (ninety) and "30" (thirty) days, respectively. In the three remaining TPAs, the parties left the blank space empty.

[21]To the extent that the rationale provided by the circuit court in *Adolpho, supra*, is inconsistent with today's decision, it is hereby disapproved. Notwithstanding the express contemplation of "collective contract[s] or program[s]" in HHCA § 209(a)

(Footnote continued)

Thus, we hold that the TPAs in the instant case are void *ab initio* because they violate the HHCA.

IV. CONCLUSION

For the foregoing reasons, we reverse the circuit court's order granting summary judgment and awarding costs to the Appellees and remand with instructions to enter an order granting summary judgment and awarding costs, exclusive of CALR expenses, if any, to the Appellants.

Carl C. Christensen and Paul F. N. Lucas (Alan T. Murakami and Arnold L. Lum with them on the briefs of the Native Hawaiian Legal Corporation) for plaintiffs-appellants.

/s/ Ronald T. Y. Moon

/s/ Robert G. Klein

/s/ Steven H. Levinson

/s/ Paula A. Nakayama

Steven S. Michaels (Girard D. Lau, with him on the brief), Deputy Attorneys General, for State-appellees.

/s/ Mario R. Ramil

Ward F. N. Fujimoto (of Fujiyama, Duffy & Fujiyama) for lessee defendants-appellees.

Thomas E. Cook (of Lyons, Brandt, Cook & Hiramatsu) for contracting defendants-appellees.

(Footnote continued)
and 216(c), we reject the Appellees' argument, *see supra* note 13 (citing Att'y Gen. Op. No. 55-20), that these provisions created an exception to the plain and unambiguous language of HHCA § 208(5). However, we expressly reserve comment on whether the State Appellees breached their fiduciary duty as trustees of the Hawaiian Homelands trust.

[FILED 07/08/96]

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

—oOo—

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, v. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission; ANDREW APANA, NANI BRANDT, DENNIS KAUAHI, ROBERT McFARLAND, ANN NATHANIEL, ALVINA PARK, GEORGE ROBERTSON, and PATRICK SHEEHAN, in their official capacities as members of the Hawaiian Homes Commission; DEPARTMENT OF HAWAIIAN HOME LANDS; HAWAIIAN HOMES COMMISSION; LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE R. BORDEN, JAMES A. BOSWELL, MIRIAM R. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON R. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE R. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE P. NEUHART; LARRY JEFTS, WILLIAM F. PFEIL, HAWAIIAN RESEARCH, LTD., GRANT SCHULE, SEIZEN J. BONK, NAFETALAI OTO, FRANCES I. KALELIKANE, HERMAN K. PUAA, LORRAINE M. VINCENT, LILLIAN K. AKINA, RONALD R. AKINA, HENRIETTA M. DAVIS, MATTHEW K. ADOLPHO, JR., and JULIA KELIIKULI-PETERS, Defendants-Appellees, MARY K. MAMUAD, JOHN K. KAPU, III, TOMI LOU MAMUAD, OR THEIR SUCCESSORS AND ASSIGNS; JOHN DOES 1 THROUGH 100, DOE CORPORATIONS 1 THROUGH 100 and DOE GOVERNMENTAL AGENCIES 1 THROUGH 100, Defendants

NO. 19154

APPEAL FROM THE SECOND CIRCUIT COURT

(Civ. No. 94-0305(3))

July 8, 1996

MOON, C.J., KLEIN, LEVINSON, NARAYAMA, AND RAMIL, JJ.

MOTIONS FOR RECONSIDERATION

APPENDIX "B"

Defendants-Appellees' Motion for Reconsideration and Contracting Defendants-Appellees' Joinder in Defendants-Appellees' Motion for Reconsideration filed on June 3, 1996, are hereby denied.

Ward F. N. Fujimoto
for Defendants-Appellees
on the motion.

/s/ Ronald T. Y. Moon

/s/ Robert G. Klein

Thomas E. Cook
for Contracting Defendants-
Appellees
on the joinder.

/s/ Steven H. Levinson

/s/ Paula A. Nakayama

/s/ Mario R. Ramil

NO. 19154

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, vs. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission; et al., Defendants-Appellees, MARY K. MAMUAD, et al., Defendants.	CIVIL NO. 94-03005(3) APPEAL FROM AMENDED JUDGMENT ON ALL CLAIMS BY ALL PARTIES IN THIS ACTION, FILED ON JULY 18, 1995 AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 12, 1994, GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT FILED NOVEMBER 28, 1995, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN, FILED ON MARCH 31, 1995 THE HONORABLE BOYD P. MOSSMAN Judge, Second Circuit Court

NOTICE OF JUDGMENT ON APPEAL

CERTIFICATE OF SERVICE

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Attorneys for Plaintiffs-Appellants

APPENDIX "C"

NO. 19154

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, vs. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission; et al., Defendants-Appellees, MARY K. MAMUAD, et al., Defendants.	CIVIL NO. 94-03005(3) APPEAL FROM AMENDED JUDGMENT ON ALL CLAIMS BY ALL PARTIES IN THIS ACTION, FILED ON JULY 18, 1995 AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 12, 1994, GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT FILED NOVEMBER 28, 1995, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN, FILED ON MARCH 31, 1995 THE HONORABLE BOYD P. MOSSMAN Judge, Second Circuit Court

NOTICE AND JUDGMENT ON APPEAL

TO THE HONORABLE PRESIDING JUDGE OF THE FIRST DIVISION, THIRD CIRCUIT COURT, STATE OF HAWAII

PLEASE TAKE NOTICE the following Judgment on Appeal is entered this day by the Supreme Court of the State of Hawaii:

Pursuant to the opinion of the Supreme Court entered on May 24, 1996, the Circuit Court's Order granting summary judgment and awarding costs to the Appellees as contained in the Amended Judgment on All Claims By All Parties In This Action, Filed on July 18, 1995, the Order Denying Plaintiffs' Motion for Summary Judgment Filed October 12, 1994, Granting State

Defendants' Motion for Summary Judgment Filed November 28, 1995, and Granting Private Defendants' Joinders Therein, Filed on March 31, 1995, and the Order Taxing Costs filed on March 30, 1995 in the Second Circuit Court, is reversed and remanded with instructions to enter an order granting summary judgment and awarding costs, exclusive of CALR expenses, if any, to the Appellants.

DATED: Honolulu, Hawaii, July 10, 1996.

BY THE COURT:

/s/ L. Nakagawa
Clerk

APPROVED:
/s/ Robert G. Klein
JUSTICE

NO. 19154

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, vs. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission; et al., Defendants-Appellees, MARY K. MAMUAD, et al., Defendants.	CIVIL NO. 94-03005(3) APPEAL FROM AMENDED JUDGMENT ON ALL CLAIMS BY ALL PARTIES IN THIS ACTION, FILED ON JULY 18, 1995 AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 12, 1994, GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT FILED NOVEMBER 28, 1995, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN, FILED ON MARCH 31, 1995 THE HONORABLE BOYD P. MOSSMAN Judge, Second Circuit Court

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Plaintiffs-Appellants' Notice and Judgment on Appeal was duly served upon the following parties listed below, by depositing copies thereof in the United States Postal Service with postage prepaid on May 30, 1996:

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Attorney for Licensee Defendants-Appellees

DATED: Honolulu, Hawaii, May 30, 1996.

/s/ Alan T. Murakami
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Attorneys for Kali Watson,
et al. ("State Defendants")

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs, vs. KALI WATSON, et al., Defendants.	Civil No. 94-0305(3) (Declaratory Judgment) ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 12, 1994, GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED NOVEMBER 28, 1994, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN FROM HEARING: DECEMBER 12, 1994 8:30 A.M. HON. BOYD MOSSMAN

APPENDIX "D"

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 12, 1994, GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED NOVEMBER 28, 1994, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN

This is matter came on for hearing before the Hon. Boyd Mossman, Circuit Judge for the Second Circuit, on December 12, 1994, at 8:30 a.m. Deputy Attorney General Steven S. Michaels appeared for Defendants Hoaliku Drake, Andrew Apana, Nani Brandt, Dennis Kauahi, Robert McFarlane, Ann Nathaniel, Alvina Park, George Robertson, and Patricia Sheehan, in their official capacities as chairperson and members of the Hawaiian Homes Commission, as well as the Department of Hawaiian Home Lands, and the Hawaiian Homes Commission ("State Defendants"). Ward Fujimoto appeared for Defendants Louella O.W. Albino, Alexander R.R. Bishaw, Lorraine X. Borden, James A. Boswell, Miriam K. Briones, Louis Hao, Jr., Nancy Rahinu, Evelyn R. Kanawaliwali, Emily W. Aki Swaba, George R.P. Rahinu, Jr., Jon X. Naeole, Dayna L. Naeole, Georgina R.R. Naeole, Weymouth Ramakana, John E. Kelly, Lottie Burrows, Arthur R. Raai, Daniel Kekahuna, Alice K. Demello, Sue Ann M.M. Hasegawa, Priscilla Holokai, Wayne Naeole and Williamette P. Neuhart ("Lessee Defendants"). Thomas E. Cook appeared for Defendants Larry Jefts, William F. Pfeil, Hawaiian Research, Ltd., Grant Schule, Seizen J. Bonk, and Nafetalai Oto (Contracting Defendants"). Paul Nahoa Lucas appeared on behalf of Plaintiffs Leiff Koa Bush, Martin D.L. Kahae, Collette Y. Machado, and Xelson "Mac" Poepoe. Since the date of hearing Rali Watson has succeeded Hoaliku Drake as the Chairman of the Hawaiian Homes Commission and the Director of the Department of Hawaiian Home Lands, and he is substituted automatically in her stead as a party defendant.

Before the Court at the hearing were Plaintiffs' Motion for Summary Judgment filed October 12, 1994, State Defendants' Motion for Summary Judgment filed November 28, 1994, and the private Defendants' joinders in the latter motion. Also awaiting final disposition was the Lessee Defendants' Motion to Dismiss Complaint filed July 14, 1994. Based upon the papers submitted in connection with the motions, and after entertaining the argument of counsel, the Court orders and finds as follows:

1: The instant claims seeking to nullify third-party agreements are in the same posture as the claims rejected-by the Supreme Court of Hawaii in *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992), and are barred by the doctrine of sovereign immunity. *See Han v. Department of Justice*, 824 F. Supp. 1480, 1489 (D. Haw. 1993), *aff'd*, No. 93-15632 (9th Cir. Jan. 13, 1995). No relief can be had against the State Defendants under the doctrine of sovereign immunity, and, without such relief available, no relief of the kind sought in this declaratory judgment action can be had against the private defendants. There is no justiciable claim for prospective equitable relief with respect to third party agreements that might be considered by the Commission in the future, either on the basis of lack of standing, or lack of a ripe controversy, and the Court therefore dismisses any such claims for such relief.

2. Even if the Court were required to reach the merits of the instant controversy, there is no genuine dispute as to the material facts, and Defendants would be entitled to a judgment as a matter of law. Neither the Hawaiian Homes Commission Act, nor general trust principles, to the extent applicable to the interpretation of the same, prohibit the Commission's acts in approving the agreements at issue in this case. Here, the law is clear that where the interests of multiple beneficiaries are in conflict, the Commission's state law trust obligation is only to deal with each impartially. *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 340, 640 P.2d 1161, 1170 (1982). It is not material that persons who are not Hawaiian beneficiaries of the Act benefit from the agreements. *See Ahia v. Department of Transportation*, 69 Haw. 538, 751 P.2d 81 (1988). The Commission has specifically adopted rules that authorize third-party agreements, *see* Haw. Admin. R. 10-3-35 (1981), and those rules do not contravene statutory authority, and were complied with in this case. The Commission has not required cultivation of a person's own tract, and therefore § 208(4) of the Act does not bar the Commission's actions here. Insofar as 208(4), if violated, is a basis for forfeiture of a lessee's interest, that section should also be construed in favor of the lessee. *See in re Smith*, 68 Haw. 466, 719 P.2d 397 (1986). Plaintiffs' reading of 208(4), moreover, would also forbid lessees from fulfilling the terms of their leases by hiring family members or native Hawaiian laborers to work the land, results at odds with Plaintiffs' claims. Plaintiffs' claims

that the agreements breach 208(5) are also without merit as a matter of law, in that the agreements here do not yield up the lessee's "interest in the tract" within the meaning of the Act; nor do the agreements constitute a "sublease" prohibited by 208(5). The agreements at issue here are mere licenses, which do not create an "interest" in land. *See Kapiolani Park Preservation Soc'y v. City and County of Honolulu*, 69 Haw. 569, 578-79, 751 P.2d 1022, 1028-29 (1988); *In re Fasi*, 63 Haw. 624, 629 & n.8, 634 P.2d 98, 102 & n.8 (1981). The standard form contracts at issue here take great care to disclaim creation of a sublease or transfer of any interest in land, militating against any holding that a prohibited sublease or transfer has been created. *See Fasi, supra*, 63 Haw. at 632, 634 P.2d at 104. Moreover, the agreements are at least ambiguous as to lessees' rights to terminate "at any time" and "for any reason," and general principles of contract interpretation would result in a construction of the agreements that would avoid a forfeiture of the underlying lease interest. For these reasons, and because equity would not be served by undoing the agreements at this time, or affording other relief, Plaintiffs' prayer, if addressed on the merits, would be denied.

3. For the reasons above, the Lessee Defendants' motion for dismissal on the basis of the preclusive effect of the disposition in *Han v. Department of Justice*, is denied as moot.

Plaintiffs' motion for summary judgment is denied, and the State Defendants' motion for summary judgment, and the private Defendants' joinders therein, are granted. Summary judgment is therefore entered pursuant to Haw. R. Civ. P. 56(b) in favor of the Defendants, and against Plaintiffs, on all claims in this action, and a separate judgment shall be entered so noting.

Dated: Wailuku, Maui, March 30, 1995.

/s/ Boyd P. Mossman
Circuit Judge of the Second Circuit

Approved as to Form:

/s/ Paul F. N. Lucas
(objections to follow)
ALAN T. MURAKAMI
PAUL F.N. LUCAS
ARNOLD L. LUM
Attorneys for Plaintiffs

/s/ Ward F. N. Fujimoto
WARD F.N. FUJIMOTO
Attorney for Lessee Defendants

/s/ Thomas E. Cook
THOMAS E. COOK
Attorney for Contracting Defendants

Order Denying Plaintiffs' Motion For Summary Judgment filed October 12, 1994, Granting State Defendants' Motion for Summary Judgment filed November 28, 1994, and Granting Private Defendants' Joinders Therein, *Bush v. Watson*, Civ. No. 94-0305(3) (Haw. 2d Cir. filed 1994)

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Attorneys for Kali Watson,
et al. ("State Defendants")

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE,	Civil No. 94-0305(3) (Declaratory Judgment)
Plaintiffs,	JUDGMENT
vs.	
KALI WATSON, et al.,	
Defendants.	FROM HEARING:
	DECEMBER 12, 1994
	8:30 A.M.
	HON. BOYD MOSSMAN

APPENDIX "E"

JUDGMENT

Pursuant to Haw. R. Civ. P. 58 and 72, Plaintiffs' motion for summary judgment is denied, and the State Defendants' motion for summary judgment, and the private Defendants' joinders therein, are granted. Summary judgment is therefore entered pursuant to Haw. R. Civ. P. 56(b) in favor of Defendants Hoaliku Drake, Andrew Apana, Nani Brandt, Dennis Kauahi, Robert McFarlane, Ann Nathaniel, Alvina Park, George Robertson, and Patricia Sheehan, in their official capacities as chairperson and members of the Hawaiian Homes Commission, as well as the Department of Hawaiian Home Lands, and the Hawaiian Homes Commission ("State Defendants"), Defendants Louella O.W. Albino, Alexander R.K. Bishaw, Lorraine K. Borden, Jamec A. Boswell, Miriam K. Briones, Louis Hao, Jr., Nancy Kahinu, Evelyn K. Kanawaliwali, Emily W. Aki Swaba, George R.P. Kahinu, Jr., Jon K. Naeole, Dayna L. Naeole, Georgina K.K. Naeole, Weymouth Kamakana, John E. Kelly, Lottie Burrows, Arthur K. Kaai, Daniel Kekahuna, Alice K. Demello, Sue Ann M.M. Hasegawa, Priscilla HOlokai, Wayne Naeole and Williamette P. Neuhart ("Lessee Defendants"), and Defendants Larry Jefts, William F. Pfeil, Hawaiian Research, Ltd., Grant Schule, Seizen J. Bonk, and Nafetalai Oto ("Contracting Defendants"), and against Plaintiffs, on all claims in this action. The Court further finds that there are no further claims that remain for resolution and that this judgment is final as to all claims.

Dated: Wailuku, Maui, March 30, 1995.

/s/ BOYD P. MOSSMAN
Circuit Judge of the Second Circuit

Approved as to Form:

/s/ Paul F. N. Lucas
(objections to follow)
ALAN T. MURAKAMI
PAUL F.N. LUCAS
ARNOLD L. LUM
Attorneys for Plaintiffs

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Attorney for Lessee Defendants

Thomas E. Cook
THOMAS E. COOK
Attorney for Contracting Defendants

NO. 19154 [FILED 06/03/96]

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE,	CIVIL NO. 94-0305(3)
Plaintiffs-Appellants,	APPEAL FROM THE AMENDED JUDGMENT, ON ALL CLAIMS BY ALL PARTIES IN THIS ACTION, FILED ON JULY 18, 1995 AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY
vs.	
KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission;	

[Caption continued on next page]

MOTION FOR RECONSIDERATION
MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION
CERTIFICATE OF GOOD FAITH
AFFIDAVIT OF WARD F. N. FUJIMOTO
EXHIBITS "A"-"C"
CERTIFICATE OF SERVICE

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[Continued on next page]

APPENDIX "F"

ANDREW APANA, NANI BRANDT, DENNIS KAUAHI, ROBERT McFARLAND, ANN NATHANIEL, ALVINA PARK, GEORGE ROBERTSON and PATRICIA SHEEHAN, in their official capacities as members of the Hawaiian Homes Commission; DEPARTMENT OF HAWAIIAN HOME LANDS; HAWAIIAN HOMES COMMISSION; LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, JAMES A. BOSWELL, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE P. NEUHART; LARRY JEFTS, WILLIAM F. PFEIL,	JUDGMENT FILED OCTOBER 12, 1994 GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED NOVEMBER 28, 1994, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN, FILED ON MARCH 31, 1995 The Honorable Boyd P. Mossman, Judge Second Circuit Court

[Caption continued on next page]

EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE NEUHART

HAWAIIAN RESEARCH, LTD., GRANT SCHULE, SEIZEN J. BONK, NAFETALAI OTO,

Defendants-Appellees,

MARGARET E. KALILIKANE, MARY K. MAMUAD, HERMAN K. PUAA, LORRAINE M. VINCENT, LILLIAN K. AKINA, RONALD K. AKINA, HENRIETTA M. DAVIS, MATTHEW K. ADOLPHO, JR., JOHN K. KAPU III, JULIA KELIIKULI-PETERS, TOMI LOU MAMUAD, OR THEIR SUCCESSORS AND ASSIGNS; JOHN DOES 1 THROUGH 100, DOE CORPORATIONS 1 THROUGH 100 and DOE GOVERNMENTAL AGENCIES 1 THROUGH 100,

Defendants.

MOTION FOR RECONSIDERATION

Come now Defendants-Appellees LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, JAMES A. BOSWELL, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE NEUHART (hereinafter "Lessee Defendants-Appellees"), by and through their attorneys, FUJIYAMA, DUFFY & FUJIYAMA, and respectfully move this Honorable Court to reconsider its opinion filed May 24, 1996, for the reason that the opinion may have misapprehended or overlooked the following points of fact and/or law:

1. If the Court's conclusion that Lessee Defendants-Appellees do *not* possess property interests is correct, then, under the general rule that a

grantor can convey no greater rights than it possesses, it is logically impossible for Lessee-Defendants Appellees to convey property interests in the Third-Party Agreements ("TPAs");

2. If Lessee Defendants-Appellees possess property interests, then, as a matter of law, no interests were conveyed via the Third-Party Agreements where, under the weight of authority of this Court and elsewhere, licenses are not property interests;

3. If Lessee Defendants-Appellees possess property interests, then this Court's opinion is a taking of property interests without just compensation in violation of the United States and Hawaii Constitutions; and

4. Summary judgment should not be granted in favor of the party bearing the burden of proof.

This motion is made pursuant to Rules 27 and 40 of the Hawaii Rules of Appellate Procedure and is based upon the memorandum of law, certificate of good faith, affidavit and exhibits attached hereto, and the records and files in this case.

DATED at Honolulu, Hawaii, June 3, 1996.

/s/ Ward F. N. Fujimoto
WARD F. N. FUJIMOTO
Attorneys for Lessee
Defendants-Appellees

NO. 19154

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, vs. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission; et al., Defendants-Appellees, and MARY K. MAMUAD, et al., Defendants.	CIVIL NO. 94-0305(3) APPEAL FROM AMENDED JUDGMENT, ON ALL CLAIMS BY ALL PARTIES IN THIS ACTION, FILED ON JULY 18, 1995 AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 12, 1994, GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED NOVEMBER 28, 1994, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN, FILED ON MARCH 31, 1995 The Honorable Boyd P. Mossman, Judge Second Circuit Court

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Come now Defendants-Appellees LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, JAMES A. BOSWELL, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE NEUHART (hereinafter collectively referred to as "Lessee Defendants-Appellees" where appropriate), by and through their attorneys, FUJIYAMA, DUFFY & FUJIYAMA, and

respectfully submit their Memorandum In Support Of Motion For Reconsideration pursuant to Rules 27 and 40 of the Hawaii Rules of Appellate Procedure.

I. *INTRODUCTION/SUMMARY OF ARGUMENT:*

This appeal arises out of litigation brought by one group of Native Hawaiians against another group of Native Hawaiians (including Lessee Defendants-Appellees) over Third-Party Agreements (hereinafter "TPAs"), duly formulated and approved by the Department of Hawaiian Home Lands (hereinafter "DHHL") and the Hawaiian Homes Commission (hereinafter "HHC") granting revocable licenses to certain non-Native Hawaiians (i.e., Licensee Defendants-Appellees) to assist Native Hawaiians in making meaningfully beneficial use of agricultural homestead leases pursuant to the Hawaiian Homes Commission Act of 1920 (hereinafter "HHCA"), 48 U.S.C. §§ 691 *et seq.*, and the Admission Act of 1959 (hereinafter "Admission Act"), 48 U.S.C. Prec. § 491.

In its May 24, 1996 opinion, a true copy of which is attached hereto as Exhibit "A", this Honorable Court, among other things, held that:

(1) Lessee Defendants-Appellees do *not* possess substantial property interests,[1] and

(2) Lessee Defendants-Appellees' grant of licenses in the form of Third-Party Agreements ("TPAs") convey at least a portion of their "extant" property interests in violation of HHCA § 208(5).[2]

Under Rule 40 of the Hawaii Rules of Appellate Procedure (hereinafter "HRAP"), this Court may reconsider a previously rendered opinion where the court has overlooked or misapprehended a point of law or fact. *See State v. Kwak*, 80 Haw. 297, 909 P.2d 1112 (1995) (reconsideration is appropriate where the Hawaii Supreme Court has misapprehended a point of law); *Yoshizaki v. Hilo Hospital*, 50 Haw. 40, 429 P.2d 829 (1967) (per curiam). (Under prior law, rehearing by the Hawaii Supreme Court is ordinarily ordered in a situation where the Court has overlooked controlling authority or some other matter material to the decision.).

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[1]May 24, 1996 Opinion at 19-21 (citing *Bush v. Hawaiian Homes Commission ["Bush I"]*, 76 Haw. 128, 870 P.2d 1272 (1994)).

[2]May 24, 1996 Opinion at 21-28.

As more fully set forth below, this Honorable Court's May 24, 1996 Opinion may have misapprehended or overlooked the following points of fact and/or law:

1. If the Court's conclusion that Lessee Defendants-Appellees do *not* possess property interests is correct, then, under the general rule that a grantor can convey no greater rights than it possesses, it is logically impossible for Lessee-Defendants Appellees to convey property interests in the Third-Party Agreements ("TPAs");

2. If Lessee Defendants-Appellees possess property interests, then, as a matter of law, no interests were conveyed via the Third-Party Agreements where, under the weight of authority of this Court and elsewhere, licenses are not property interests;

3. If Lessee Defendants-Appellees possess property interests, then this Court's opinion is a taking of property interests without just compensation in violation of the United States and Hawaii Constitutions; and

4. Summary judgment should not be granted in favor of the party bearing the burden of proof.

For these reasons, and in good faith, Lessee Defendants-Appellees respectfully request reconsideration of its May 24, 1996 Opinion and affirmance of the lower court's judgment.[3]

II. *ARGUMENT:*

Lessee Defendants-Appellees' Motion For Reconsideration should be granted for reasons including, but not limited to, the following:

A. *IT IS LOGICALLY IMPOSSIBLE FOR LESSEE DEFENDANTS-APPELLEES TO CONVEY PROPERTY INTERESTS IN THE TPAS IF THEY DID NOT POSSESS PROPERTY INTERESTS.*

It is fundamental law that a grantee of rights can possess no greater rights than the grantor possessed before the grant. *E.g., Liberty Mutual Insurance Co. v. United National Insurance Co.*, 69 Haw. 37, 41, 731 P.2d 167, 170 (1987) (subrogee possesses no greater rights than that originally available to subrogor); *Fred v. Pacific Indemnity Co.*, 53 Haw. 397, 494 P.2d 783 (1972) (substituted loss-payee under marine insurance policy could

[3]In addition, Lessee Defendants-Appellees maintain and incorporate all arguments raised in their Answering Brief, filed herein on November 24, 1995, a true copy of which is attached hereto as Exhibit "B" and incorporated herein by reference.

assert no greater rights than those of original assured); *Lee v. North Dakota Park Service*, 262 N.W.2d 467 (N.D. 1977) (licensee could acquire no greater rights than that possessed by licensor).

Accordingly, if the Court's conclusion that Lessee Defendants-Appellees do *not* possess property interests is correct, then, under the general rule that a grantor can convey no greater rights than it possesses, it is logically impossible for Lessee-Defendants Appellees to convey property interests in the Third-Party Agreements ("TPAs"). If no property interests were conveyed, there can be no violation of HHCA § 208(5).

B. *THE GRANT OF LICENSES IN THE TPAS DO NOT CONVEY PROPERTY INTERESTS AS A MATTER OF HAWAII LAW.*

This Court's suggestion that Lessee Defendants do not possess substantial property interests in its May 24, 1996 Opinion is contrary to its prior decisions (other than *Bush I*).

In *Aged Hawaiians v. Hawaiian Homes Commission*, 78 Haw. 192, 891 P.2d 279 (1995), *cert. denied sub nom, Hawaiian Homes Commission v. Aged Hawaiians*, 116 S. Ct. 77 (1995), this Court held that *prospective* lessees of pastoral leases under the HHCA possess property rights substantial enough to be entitled to due process protection. *See also State v. Jim*, 80 Haw. 168, 907 P.2d 754 (1995) (recognizing that State of Hawaii owes trust obligations to Native Hawaiians generally with respect to HHCA lands); *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982) (Native Hawaiians are beneficiaries of fiduciary trust obligations owed by the State of Hawaii).

If *prospective* HHCA lessees possess property rights capable of due process protection, then, *a fortiori, existing* Native Hawaiian lessees of HHCA leases, including Lessee Defendants-Appellees, most assuredly possess substantial property rights. Although Lessee Defendants-Appellees possess substantial property rights, their grant of revocable licenses in the TPAs do not convey property "interests" where: (1) licenses in the law of real property, in this jurisdiction and others, do not convey property interests, (2) the essential character of a license is not affected by any notice provisions, (3) policy considerations preclude characterization of licenses as interests in land, and (4) it remains undisputed that Lessee Defendants-Appellees did not convey the entirety of their "interests in the tract."

1. *Licenses Do Not Convey Property Interests.* In its May 24, 1996 Opinion, this Court concluded that licenses can convey property interests. However, the weight of authority is that licenses, in the law of real property in this jurisdiction and others, do not convey property interests.

a. *Hawaii law.* Although this Court ultimately concluded otherwise, in footnote 11 of the same May 24, 1996 Opinion, this Court inconsistently recognized that, by definition, a license is repugnant to an interest in land:

> A license in real property is defined as a personal, revocable, and unassignable privilege conferred either by writing or parole, to done or more acts on land *without possessing any interest therein... [A] license is distinguishable from a lease in that a lease conveys an interest in land* and transfers possession[.]
>
> 25 Am. Jur. 2d *Easements and Licenses* § 125 at 527-28 (1966). *See also Black's Law Dictionary* 919-20 (6th ed. 1990) (A 'license' is a 'personal privilege to do some particular act or series of acts on land *without possessing any estate or interest therein*, and is ordinarily revocable at the will of the licensor and is not assignable.').

May 24, 1996 Opinion at 17 n.11 (emphasis added).

Even if *Adolpho v. Kealoha*, Civil No. 243 (Haw. 2d Cir. 1960) is discounted, the above-quoted portion of this Court's May 24, 1996 opinion is the only correct statement of Hawaii law. In *Kapiolani Park Preservation Society v. City & County Of Honolulu*, 69 Haw. 569, 579, 751 P.2d 1022, 1028-29 (1988) (cited on other grounds by this Court in its May 24, 1996 Opinion at 25), this Court followed a "plethora of decided cases" and articulated a sharp distinction between leases and licenses by focusing on the fact that the former conveys an interest in land whereas the latter does not:

> There are a plethora of decided cases distinguishing between *leases, which convey an interest in land*, and mere licenses of which concessions are an example.
>
> * * * *
>
> A 'license' in the law of real property is 'authority to do a particular act or series of acts upon another's land *without possessing any estate therein*.' [Citation omitted.] It is a personal privilege, is not

> assignable, ceases upon the death of either party and is revoked by a sale of the land by the licensor. But the agreement expressly binds the executors, administrators, and assigns of the parties... *If the instrument in question passes to the plaintiff a right to use the land for a definite term for a specific purposes,...it creates an 'interest' in land and therefore it does not create a license revocable at the will of the licensor[.]*

(Quoting *McCandless v. John Ii Estate*, 11 Haw. 777, 788-89 (1899)) (emphasis added).[4] *See also In re Fasi*, 64 Haw. 624, 629 n.8, 634 P.2d 98, 102 n.8 (1981) (This Court held that a license was not sufficient to transfer property interests for purposes of real property taxation where a license "is an authority to do a particular act or series of acts upon another's land without possessing any estate therein."); *Consolidated Amusement Co. v. Waikiki Business Plaza, Inc.*, 6 Haw. App. 312, 318, 719 P.2d 1119, 1123-24 (1986) (A license "is an authority to do a particular act or series of acts upon another's land without possessing any estate therein.").

The foregoing authorities also dictate that, in determining whether a particular grant is a license, the Court should look to the terms of the grant to determine the intent of the parties. *See also Territory v. Tsunekichi*, 23 Haw. 813, 820-21 (1917). As the Court recognizes, by their terms, the TPAs are revocable at will and do *not expressly* convey any property interest from the lessee. In *Ideta v. Kuba*, 21 Haw. 751 (1913), the Hawaii Supreme Court held that a similar agreement was merely a license *revocable at will* and did not create an easement with respect to a right of way.

> In our judgment the case presents an illustration of a simple parol license bare of any special or complicating features – a mere personal privilege – which under all the authorities is *revocable at*

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[4]Although this Court did not expressly find that the TPA's are "subleases," it should be remembered that just as licenses do not convey interests in land under Hawaii law, licenses are not subleases under Hawaii law and elsewhere. In *Brewer v. Chase*, 3 Haw. 127, 140 (1869), the Hawaii Supreme Court recognized that a covenant against "subletting" was not breached by the sharing of office space with a physician. Applying similar principles, courts have generally held that licenses to third parties do not constitute subletting. *See, e.g., Mann Theatres Corp. v. Mid-Island Shopping Plaza Co.*, 94 A.D.2d 466, 471-72, 464 N.Y.S.2d 793, 798 (1983), *aff'd*, 62 N.Y.2d 930, 468 N.E.2d 51, 479 N.Y.S.2d 213 (1984).

> *the will of the licensor*. 1 Washburn, Real Prop. (5th ed) 632; 25 Cyc. 645. We conclude that the respondent was acting within his rights in the premises when he revoked the license, that *his right to revoke it was subject to no condition*, and that the complainant failed to show that he was entitled to the injunction sought.

Id. at 755 (emphasis added). Moreover, the concurring opinion of Justice De Bolt suggests the same conclusion.

> I am inclined to the view that the record shows that the new right of way is an executed license; but *the great weight of authority is, as I believe, that neither the execution of the license, nor the incurring of expense, nor both combined, affect the right of the licensor to revoke.*

Id. at 755-66 (emphasis added; citations omitted).

Ideta and other decisions of the Hawaii Supreme Court set forth the general rule that a "license," by definition, is revocable at the will of the putative "licensor" and does not convey any property interest. In *Kamehameha v. Nahaolelua*, 2 Haw. 378 (1861), the plaintiff brought a trespass action against certain defendants with respect to their entry on a property located in Lahaina. The defendants in turn contended that the Plaintiffs' guardian had granted a public right of way with respect to the property. In rejecting this contention, the Hawaii Supreme Court held that the mere fact that the guardian had permitted defendants to use the way did not convey any property interest in the way.

> [O]n the contrary, it appears to us that the re-opening of the way over the plaintiff's premises, by Mr. Ii, amounted to nothing more than a renewal of the former *permissive use*, which had been temporarily interrupted; and being in law *not a dedication*, but merely a license revocable, the plaintiff may revoke the license at his pleasure, and resume the possession of the *locus in quo*.

Id. at 381 (emphasis in original).

As set forth above, this Court's conclusion that a "mere license" can be an interest in land is contrary to virtually all of the numerous prior Hawaii decisions on the subject and would therefore constitute a radical departure from Hawaii law. Such a departure, it is respectfully submitted, would violate the doctrine of stare decisis and jeopardize this Court's practice of upholding

the desire that the law provide a clear guide for individuals to enable them to plan their affairs without untoward surprise and this Court's goal of maintaining public faith in this Court. See *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982).

b. *Other jurisdictions.* As correctly set forth in footnote 11 of this Court's May 24, 1996 Opinion, the black-letter law of other jurisdictions is that licenses are simply *not* "interests" in land in the pure sense of the term.

The two primary authorities cited by the Court in support of the contrary conclusion are nevertheless in accord with this view. For example, while this Court cited comment c to Restatement Of Property § 512 for the proposition that a license is an "interest" in land for purposes of the Restatement, the gravamen of that comment is the opposite with respect to statutory uses of the phrase "interests in land":

> *This does not mean that they are 'interests in land' in every use of the phrase.* For example, it does not mean that they are necessarily 'interests in land' as that phrase is used in the *Statute Of Frauds*.

(Emphasis added).

Likewise, the thrust of 3 R. Powell, *Powell On Real Property* § 34.25 (Rohan ed. 1996), also cited by this Court, is that licenses are *not* "substantial interests in land" for purposes of statutory construction.

> Such a revocable privilege is an 'interest in land' as that has been defined in Section 5 of the Restatement of Property and as the term is used in this Treatise. *This does not mean (1) that the revocable privilege should be treated as a substantial interest in land, or (2) that it is such an interest in land as comes within statutory requirements of a writing or of a seal for its creation*, or (3) that the licensee is entitled to compensation on a taking of a servient parcel by condemnation. *The evanescent, fleeting, revocable character of the interest justifies a denial of treatments accorded to more substantial interests in land* but does not justify a denial of its character as an interest in land, while it lasts.

(Emphasis added); *see also United States v. Anderson County, Tennessee*, 575 F. Supp. 574, 578 (E.D. Tenn. 1983), *aff'd*, 761 F.2d 1169 (6th Cir. 1985), (holding that, notwithstanding Restatement view, "[a] license creates no estate in land and is generally not considered an interest in land.

53 C.J.S. Licenses § 79 (1948); 25 Am. Jur. Easements & Licenses § 123 (1966)."); *Race v. Meyer*, 640 N.Y.S.2d 664, 667 (A.D. 1996) (a license is merely a personal privilege to do some act on land without possessing any interest therein); *Sammons v. American Automobile Assn.*, 912 P.2d 1103, 1105 (Wyo. 1996) (A license does not give any interest in the land); *Lodestar Tower North Palm Beach, Inc. v. Palm Beach Television Broadcasting, Inc.*, 665 So.2d 368, 370 (Fla. Dist. Ct. App. 1996) (A license confers no interest but merely gives one authority to do a particular act on another's land, may be created orally, and is generally revocable.).

Since the weight of authority is that a license is *not* a substantial interest in land, the TPAs cannot have conveyed property interests.

2. *The Essential Character Of A License Is Not Affected By Notice Provisions.* This Court placed a large degree of significance on the TPAs' notice provisions, which, in the Court's view, "arguably" created a fixed term to the TPAs. May 24, 1996 Opinion at 27.[5] However, again, the weight of authority in this Court and elsewhere, is that notice provisions do *not* affect the essential nature or term of a transaction.

In *Hawaiian Electric Co. v. DeSantos*, 63 Haw. 110, 621 P.2d 971 (1980), this Court held that a six-month notice requirement in a lease did not alter the conclusion that successor tenants were month to month tenants and reasoned that "obviously," termination of leases is covered by the respective lease agreements.

Likewise, in *FFG, Inc. v. Jones*, 6 Haw. App. 35, 708 P.2d 836 (1985), the Intermediate Court of Appeals held that a notice provision in a lease agreement governing termination did not in any way inhibit or restrict the lessor's right to enforce the terms of the Lease without waiting 30 days and seeking a termination of the Lease.

Applying similar rationales, courts have held that notice provisions do not transform a license into a lease where the essential nature of the transaction (other than the notice provision) is a license.

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[5]In its May 24, 1996 Opinion at 27 n.20, the Court did not deem it significant that certain of the TPAs contain a blank notice period. However, in situations where the notice period is blank, no notice is required for revocation of those respective TPAs, and the Court's concern with "fixed terms" would apparently be obviated. Consequently, at the very least, those TPAs with blank spaces concerning notice requirements should be upheld.

In *Lee v. North Dakota Park Service*, 262 N.W.2d 467 (N.D. 1977), the North Dakota Supreme Court held that a license was not transformed into a lease and its revocability was not affected by a notice provision.

In *Ideal Trading Corp. v. 237 East Ontario Corp.*, 82 Ill. App. 2d 160, 170-72, 227 N.E.2d 150, 155-56 (1967), the Illinois Appellate Court held that a notice provision did not create an irrevocable license.

In *Lake Martin/Alabama Power Licensee Association, Inc. v. Alabama Power Co.*, 547 So.2d 404, 409 (Ala. 1989), the Alabama Supreme Court held that a fixed notice provision did not affect the revocability of a license.

Consequently, the TPAs' notice provisions do not affect their essential character as being nothing more than a license that does *not* convey any interests in the respective leases.

3. *Public Policy Precludes Treatments Of Licenses As Interests In Land.* Characterization of licenses as interests in land can have undesirable consequences from a public policy standpoint. For example, in this jurisdiction, interests in land can be taxed by property taxes, conveyance taxes, and are subject to the statute of frauds and recordation requirements, among other things.

In contrast, licenses include football tickets to University of Hawaii games at Aloha Stadium and movie tickets to one's favorite theatre. *See* R. Powell, *supra*. In each event, there is a revocable privilege of entry upon land which, under this Court's May 24, 1996 Opinion, are interests in land. Yet, it is unlikely that anyone would seriously contend that a U.H. football ticket or a movie ticket should be subject to conveyance taxes or property taxes. Imposition of such taxes would cripple the University of Hawaii athletic department budget by deterring fan attendance and undermine the jobs created by such events.

In addition, the State of Hawaii does a substantial amount of its contracting work at the Honolulu International Airport via license agreements. *See In re Fasi*, 64 Haw. 624, 634 P.2d 98 (1981). Again taxation of such arrangements as conveyances of "property interests" would have adverse consequences. Even worse, characterization of such arrangements as "property interests" may risk a regulatory takings issue every time such an arrangement is terminated or revoked.

In the instant case, this Court's broad declaration that a homestead lessee's licenses are property interests in violation of HHCA § 208(5) may

also have larger implications with respect to the federally-funded Molokai Agricultural Community ("MAC") program in which homestead lessees enter into agreements with the federal government for agricultural aid/cost-sharing in exchange for certain conditions with regard to soil and water conservation, including, but not limited to, rights of entry and contract periods of five to fifteen years. *See* Exhibit "C" attached hereto. Where many of Plaintiffs-Appellants themselves participate in the MAC program, it is undisputed that the MAC program is a socially desireable means of Native Hawaiian betterment. Yet, where these contractual arrangements are comparable to the TPAs in the instant case, they are arguably voided by this Court's May 24, 1996 Opinion.

4. *There Is No Violation Of HHCA § 208(5) Where Lessee Defendants Did Not Convey The Entirety Of Their Interests In The Tract.* HHCA § 208(5) prohibits transfers of "the person's interest in the tract." *See* May 24, 1996 Opinion at 16-17. In contrast, this Court held that Lessee Defendants-Appellees transferred "at least a portion of the lessee's extant interests in the homesteads." *Id.* at 27. It remains undisputed that Lessee Defendants-Appellees did not transfer their entire "interest in the tract" and, accordingly, there can be no violation of HHCA § 208(5).

C. *THIS COURT'S MAY 24, 1996 OPINION IS A TAKING OF PROPERTY WITHOUT JUST COMPENSATION.*

It is presumed that a legislative body does not intend an unconstitutional result and a statute should not be construed to bring about such results where they can reasonably be avoided. *See Kapiolani Park Preservation Society v. City and County of Honolulu*, 69 Haw. 569, 751 P.2d 1022 (1988).

The Fifth Amendment Of the United States Constitution, made applicable to the States via the Fourteenth Amendment, forbids that "private property be taken for public use without just compensation." Article I, Section 20 of the Hawaii State Constitution is to the same effect.

In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), the United States Supreme Court held that a state law which deprives a property holder of all economically viable use of his property can constitute a regulatory taking of property without just compensation within the meaning of the Fifth Amendment. In *Pacific Access Shoreline Hawaii (PASH) v. Hawaii County Planning Commission*, 79 Haw. 425, 451-52, 903

P.2d 1246, 1272-73 (1995), this Court recognized the holding of *Lucas* with regard to regulatory takings.[6]

In *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2316 (1994), the United States Supreme Court held that, in order to disprove a taking via governmental action, the State must establish that the action both (1) substantially advances legitimate state interests and (2) does not deny an owner of economically viable use of his land. *See also Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987).

Courts are not immune from prohibitions against taking property without just compensation when unpredictable changes in state law operate to produce such a result. *Sotomura v. Hawaii County*, 402 F. Supp. 95 (D. Haw. 1975). By depriving Lessee Defendants-Appellees of economic viability with regard to their leases and by effecting the same based on a retroactive change in the law without any essential nexus with HHCA § 208(5), this Court's May 24, 1996 Opinion is a taking of property interests without just compensation in violation of the United States and Hawaii Constitutions.

1. *Lessee Defendants-Appellees Possess Property Interests.* As set forth *supra*, Lessee Defendants-Appellees possess property interests in their homestead leases and these interests are substantial enough for constitutional protections. *Aged Hawaiians v. Hawaiian Homes Commission*, 78 Haw. 192, 891 P.2d 279 (1995).

2. *This Court's May 24, 1996 Opinion Deprives Lessee-Defendants-Appellees Of Economically Viable Uses Of Their Leases.* In determining whether a property holder has been deprived of economically viable uses of his/her property, the Court should, at the very least, look to two independent indicators of such deprivations (either of which would be sufficient): (1) the economic impact of the governmental action on the property holder and (2) the extent to which the governmental action has interfered with investment-backed expectations of the property holder. *See Lucas*, 112

[6]In *PASH*, the Court held that the regulatory taking issue was not yet ripe for review where the Court had remanded the case for further determinations on the regulation in question. However, unlike *PASH*, this Court's May 24, 1996 Opinion remands the instant case to the Circuit Court of the Second Circuit, State of Hawaii, for the entry of summary judgment in favor of Plaintiffs-Appellants. Therefore, *PASH*'s conclusion on the ripeness issue is inapposite and the instant case is ripe for takings analysis.

S.Ct. at 2893-94. While either indicator would be sufficient, both of these indicators indicate a deprivation in the instant case.

a. *Economic Impact On Lessee Defendants-Appellees.* This Court's May 24, 1996 Opinion concludes that the TPAs are void and therefore deprives Lessee Defendants-Appellees of TPAs as a use with regard to their respective leases. The best evidence of what would happen to Lessee Defendants-Appellees without the TPAs under current market conditions is that Plaintiffs-Appellants have brought this action claiming an inability to compete against large-scale farming operations such as that operated by Licensee Defendants-Appellees. R. 2 at 324, 346; *see also* Opening Brief, filed herein on October 13, 1995, at 3. They have claimed, and therefore admitted, that it is not economically viable to operate a homestead farm competing against such large-scale operations. R. 2 at 324, 346; *see also* Opening Brief, filed herein on October 13, 1995, at 3.

Although Plaintiffs-Appellants have lamented that all of their competitive problems are due to Licensee Defendants-Appellees, the economic reality is that Licensee Defendants-Appellees are but a few of many non-Hawaiian large-scale agribusinesses in this State. Elimination of the TPAs will not cause Licensee Defendants-Appellees to disappear (they would merely relocate their operations to non-homestead lands), nor would it mitigate the harsh economic competition against other non-Hawaiian agribusinesses. Consequently, it is, at best, speculative that Plaintiffs-Appellants would be able to achieve any greater degree of success without the TPAs than with the TPAs.

Just as it would be speculative for Plaintiffs-Appellants to contend that their problems would be eliminated by invalidation of the TPAs, so to would it be speculative to believe that Lessee Defendants-Appellees could be economically successful without the TPAs. So understood, Plaintiffs-Appellants claims, as well as this Court's May 24, 1996 Opinion, condemn Lessee Defendants-Appellees to the same economic failures presently alleged by Plaintiffs-Appellants. Under these circumstances, it is clear that this Court's May 24, 1996 Opinion would work a deprivation of all economically viable uses of Lessee Defendants-Appellees' leases.

b. *Investment-Backed Expectations.* In the instant case, Lessee Defendants-Appellees have, in good faith, accepted the DHHL's invitation

to sign approved TPAs on forms drafted by the DHHL and ultimately approved by the HHC, with the expectation of a mutually beneficial relationship with Licensee Defendants-Appellees. *See* Answering Brief at 3-4 and portions of the record cited therein. They have invested, though actions and/or forbearance, time and money into the relationships in reliance on the legal validation of the TPAs by DHHL/HHC. It is clear that, by invalidating the TPAs, this Court's May 24, 1996 Opinion will frustrate the reasonable expectations of Lessee Defendants-Appellees with regard to their leases.

3. *There Is No Essential Nexus Between This Court's May 24, 1996 Opinion And HHCA § 208(5).* In order to establish that governmental action "substantially advances legitimate state interests," the State must establish that (1) there is an "essential nexus" between the governmental action and the state interests and (2) the restriction on the property holder is "roughly proportional" to the impact of the restricted activity on those state interests. *See Dolan v. City of Tigard*, 114 S.Ct. 2309, 2316 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987). Neither burden is met here.

First, the state interest purportedly advanced by the May 24, 1996 Opinion is the HHCA § 208(5)'s proscription against transfers of interest by lessees to non-Hawaiians. However, as set forth *supra*, the TPAs are essentially revocable licenses and do *not* legally transfer any property interests. Therefore, there is no essential nexus between this Court's May 24, 1996 Opinion and HHCA § 208(5).

Second, the harsh remedy of invalidation of the TPAs is not even roughly proportional to any impact of the TPAs upon Plaintiffs-Appellants' abilities to compete with non-Hawaiian agribusinesses. As noted *supra*, any such impact is speculative where Licensee Defendants-Appellees are but a few of several non-Hawaiian agribusinesses and, by invalidating the TPAs, the Court is condemning Lessee Defendants-Appellees to the same economic failure as Plaintiffs-Appellants.

Under these circumstances, this Court's May 24, 1996 Opinion cannot meet the requirement of an essential nexus.

4. *This Court's Change In The Law Regarding HHCA § 208(5) And Licenses Amounts To A Judicial Taking.* In *Pacific Access Shoreline Hawaii*

(PASH) v. Hawaii County Planning Commission, 79 Haw. 425, 451, 903 P.2d 1246, 1272 (1995), this Court assumed the viability of, but did not expressly recognize, the "judicial taking" doctrine by which a taking occurs when a judicial decision alters property rights such that a change in state law is applied retroactively. (Citing *Chicago Burlington & Quincy RR. Co. v. Chicago*, 166 U.S. 226, 235 (1897), among other authorities).

Prior to this Court's May 24, 1996 Opinion, *Adolpho v. Kealoha*, Civil No. 243 (Haw. 2d Cir. 1960) represented the existing law with regard to the legality of the TPAs. Likewise, as set forth *supra*, the plethora of prior published decisions from Hawaii appellate courts was unanimously of the view that a license is *not* a property interest. Therefore, and regardless if one agrees or disagrees with this Court's May 24, 1996 Opinion, it is undeniable that it represents a change in the law with regard to TPAs and licenses generally under Hawaii property law.

Furthermore, it is also undeniable that the TPAs at issue in this litigation preceded the change in law set forth in this Court's May 24, 1996 Opinion and that, in effect, this Court is retroactively applying the change in law to the circumstances of this case. *Cf. Jenkins v. Cades Schutte Fleming & Wright*, 76 Haw. 115, 119, 869 P.2d 1334, 1338 (1994) (refraining from retroactive rigid enforcement of HRCP Rule 58 to pending appeals to avoid "unnecessary hardship" to those who have relied on prior case law).

Under these circumstances, it is respectfully submitted that this Court's May 24, 1996 Opinion is a regulatory and/or judicial taking of Lessee Defendants-Appellees property rights without just compensation.

D. *SUMMARY JUDGMENT SHOULD NOT BE GRANTED IN FAVOR OF THE PARTY BEARING THE BURDEN OF PROOF.*

The mandate of this Court's May 24, 1996 Opinion is a remand with instructions to enter summary judgment in favor of Plaintiffs-Appellants. While Lessee Defendants-Appellees maintain that the entry of summary judgment in their favor was proper, it is clear that entry of summary judgment in favor of Plaintiffs-Appellants would be improper where genuine issues of material fact exist with regard to whether Plaintiffs-Appellants have met their burden of proof in this action.

Under HRCP Rule 56(c), summary judgment is proper only when there is no genuine issue as to any material fact and the moving party clearly

demonstrates that he should prevail as matter of law. *Crawford v. Crawford*, 69 Haw. 410, 412, 745 P.2d 285, 287 (1987).

A court is not empowered to try issues of fact upon a motion for summary judgment; upon such a motion, a court is only empowered to determine whether there are genuine issues of material fact to be tried. *See Earl M. Jorgensen Co. v. Mark Construction, Inc.*, 56 Haw. 466, 476, 540 P.2d 978, 985 (1975); *Waimea Falls Park, Inc. v. Brown*, 6 Haw. App. 83, 92, 712 P.2d 1136, 1142 (1985) (quoting 10 Wright, Miller and Kane, *Federal Practice and Procedure: Civil* Section 2712 (2d ed. 1983)). A fact is material if proof of the fact would establish or refute an essential element of a claim or defense. *Hulsman v. Hemmeter Development Corp.*, 65 Haw. 58, 61, 647 P.2d 713, 716 (1982). Inferences to be drawn from the record must be viewed in light most favorable to the opposing party. *Id.* So viewed, the entire record must show a right to judgment with such clarity as to leave no room for controversy and affirmatively establish that the opposing party cannot prevail under any circumstances. *Beamer v. Nishiki*, 66 Haw. 572, 578, 670 P.2d 1264, 1270 (1983); *Kukui Nuts of Hawaii, Inc. v. R. Baird & Co.*, 7 Haw. App. 599, 609, 789 P.2d 501, 509 (1990). A moving party must introduce admissible evidence in support of a motion for summary judgment, particularly where that party bears the burden of proof; in the absence of such a showing, the motion must be denied even in the absence of evidence from the opposing party. *See GECC Financial Corp. v. Jaffarian*, 79 Haw. 516, 521, 904 P.2d 530, 535 (Haw. Ct. App. 1995), *aff'd and adopted in part*, 80 Haw. 118, 905 P.2d 624 (1995); *First Insurance Co. v. Sariaslani*, 80 Haw. 491, 911 P.2d 126 Haw. Ct. App. (1996); *Miller v. Manuel*, 9 Haw. App. 56, 828 P.2d 286 (1991).

Where proof of a fact in issue depends upon oral evidence, a court is ordinarily not justified in entering summary judgment in favor of the party bearing the burden of proof. In *Vannatta v. Pacific Guardian Life Insurance Co.*, 1 Haw. App. 294, 618 P.2d 317 (1980) (per curiam), the ICA held that, even where evidence is "uncontradicted," it is improper to grant summary judgment in favor of the party bearing the burden of proof on an issue because a trier of fact can always reject such evidence:

> Appellant argues that the underwriter's affidavit that had he known the facts, he would not have issued the policy is uncontradicted and must therefore be accepted. *However, even at trial, the*

trier of fact is not bound to accept automatically uncontradicted evidence. See Pia v. Rapozo, 43 Haw. 199 (1959).

Id. at 296-97, 618 P.2d at 319 (emphasis added); see also *Feliciano v. City & County of Honolulu*, 62 Haw. 88, 93-94, 611 P.2d 989, 992-93 (1980) (same re directed verdict). The issue of credibility and weight of evidence is almost always for the jury to decide. *Orallo v. DeVera*, 1 Haw. App. 391, 394, 620 P.2d 255, 257 (1980).

In the instant case, Plaintiffs-Appellants bear the burden of proof on their claims and have not sustained their burden in establishing that the TPAs convey property interests. At the very least, whether the intent of the TPAs is to transfer a property interest is a genuine issue of material fact and summary judgment should not be entered in favor of Plaintiffs-Appellants where Plaintiffs-Appellants bear the burden of proof and the weight and credibility of their evidence are questions for the jury. *See Hanagami v. China Airlines, Ltd.*, 67 Haw. 357, 688 P.2d 1139 (1984) (contractual intent and effect are generally questions of fact).

III. *CONCLUSION:*

Based on all the foregoing reasons, arguments, and authorities, it is respectfully submitted that Lessee Defendants-Appellees' Motion For Reconsideration should be granted and the circuit court's judgment should be affirmed as to Lessee Defendants-Appellees.

DATED at Honolulu, Hawaii, June 3, 1996.

/s/ Ward F. N. Fujimoto
WARD F. N. FUJIMOTO
Attorneys for Lessee
Defendants-Appellees

NO. 19154

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, vs. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission; et al., Defendants-Appellees, and MARY K. MAMUAD, et al., Defendants.	CIVIL NO. 94-0305(3) APPEAL FROM AMENDED JUDGMENT ON ALL CLAIMS BY ALL PARTIES IN THIS ACTION, FILED ON JULY 18, 1995 AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 12, 1994, GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT FILED NOVEMBER 28, 1994, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN, FILED ON MARCH 31, 1995 The Honorable Boyd P. Mossman, Judge Second Circuit Court

CERTIFICATE OF GOOD FAITH

I hereby certify, as the attorney for Lessee Defendants-Appellees LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, JAMES A. BOSWELL, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE NEUHART, that the foregoing Motion for Reconsideration is presented in good faith and not for purposes of delay.

DATED at Honolulu, Hawaii, June 3, 1996.

/s/ Ward F. N. Fujimoto
WARD F. N. FUJIMOTO
Attorneys for Lessee
Defendants-Appellees

NO. 19154

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, vs. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission; et al., Defendants-Appellees, and MARY K. MAMUAD, et al., Defendants.	CIVIL NO. 94-0305(3) APPEAL FROM AMENDED JUDGMENT ON ALL CLAIMS BY ALL PARTIES IN THIS ACTION, FILED ON JULY 18, 1995 AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 12, 1994, GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT FILED NOVEMBER 28, 1994, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN, FILED ON MARCH 31, 1995 The Honorable Boyd P. Mossman, Judge Second Circuit Court

AFFIDAVIT OF WARD F. N. FUJIMOTO

STATE OF HAWAII)
: SS.
CITY AND COUNTY OF HONOLULU)

WARD F. N. FUJIMOTO, being first duly sworn, on oath, deposes and says:

1. That he is licensed to practice law in all courts of the State of Hawaii, the United States District Court for the District of Hawaii, and the United States Court of Appeals for the Ninth Circuit;

2. That he is a member of the law firm of FUJIYAMA, DUFFY & FUJIYAMA, attorneys for Lessee Defendants-Appellees LOUELLA O. W.

ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, JAMES A. BOSWELL, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE NEUHART in connection with the above-captioned appeal;

3. That he has personal knowledge of the matters set forth herein except and unless stated to be upon information and belief;

4. That the foregoing Motion for Reconsideration is presented in good faith and not for purposes of delay;

5. That attached hereto as Exhibit "A" is a true, accurate, and complete copy of this Court's Opinion entered herein on May 24, 1996;

6. That attached hereto as Exhibit "B" is a true, accurate, and complete copy of Lessee Defendants-Appellees' Answering Brief, filed herein on November 24, 1995;

7. That attached hereto as Exhibit "C" is a true, accurate and complete copy of a facsimille transmission he received on June 3, 1996 from Ms. Debbie Kelly, enclosing specimen copy of the contract utilized by the Molokai Agricultural Community ("MAC") program;

8. That, upon information and good faith belief, Ms. Kelly is the district coordinator for the MAC program on Molokai; and

Further Affiant Sayeth Naught.

/s/ Ward F. N. Fujimoto
WARD F. N. FUJIMOTO

Subscribed and sworn to before me
this 3rd day of June, 1996.

/s/ Joycelynn G. S. Costa
Notary Public, State of Hawaii.

My commission expires: 2/1/00

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

—OoO—

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, v. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission; ANDREW APANA, NANI BRANDT, DENNIS KAUAHI, ROBERT McFARLAND, ANN NATHANIEL, ALVINA PARK, GEORGE ROBERTSON, and PATRICK SHEEHAN, in their official capacities as members of the Hawaiian Homes Commission; DEPARTMENT OF HAWAIIAN HOME LANDS; HAWAIIAN HOMES COMMISSION; LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, JAMES A. BOSWELL, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN R. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE R. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE P. NEUHART; LARRY JEFTS, WILLIAM F. PFEIL, HAWAIIAN RESEARCH, LTD., GRANT SCHULE, SEIZEN J. BONK, NAFETALAI OTO, FRANCES I. KALELIKANE, HERMAN K. PUAA, LORRAINE M. VINCENT, LILLIAN K. ARINA, RONALD K. ARINA, HENRIETTTA M. DAVIS, MATTHEW K. ADOLPHO, JR., and JULIA KELIIKULI-PETERS, Defendants-Appellees, MARY K. MAMUAD, JOHN R. KAPU, III, TOMI LOU MAMUAD, OR THEIR SUCCESSORS AND ASSIGNS; JOHN DOES 1 THROUGH 100, DOE CORPORATIONS 1 THROUGH 100 and DOE GOVERNMENTAL AGENCIES 1 THROUGH 100, Defendants

NO. 19154

APPEAL FROM THE SECOND CIRCUIT COURT

(Civ. No. 94-0305(3))

May 24, 1996

MOON, C.J., KLEIN, LEVINSON, NARAYAMA, AND RAMIL, JJ.

OPINION OF THE COURT BY KLEIN, J.

EXHIBIT "A"

[Complete copy of this Exhibit is omitted
since it also appears as Appendix "A" hereto]

NO. 19154 [FILED 06/03/96]

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, vs. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission;	) CIVIL NO. 94-0305(3))) APPEAL FROM AMENDED) JUDGMENT, ON ALL) CLAIMS BY ALL PARTIES) IN THIS ACTION, FILED ON) JULY 18, 1995 AND ORDER) DENYING PLAINTIFFS') MOTION FOR SUMMARY

[Caption continued on next page]

LESSEE DEFENDANTS-APPELLEES' ANSWERING BRIEF

CERTIFICATE OF SERVICE

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Attorneys for Defendants-Appellees LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, JAMES A. BOSWELL, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI,
[Continued on next page]

EXHIBIT "B"

ANDREW APANA, NANI BRANDT, DENNIS KAUAHI, ROBERT McFARLAND, ANN NATHANIEL, ALVINA PARK, GEORGE ROBERTSON and PATRICIA SHEEHAN, in their official capacities as members of the Hawaiian Homes Commission; DEPARTMENT OF HAWAIIAN HOME LANDS; HAWAIIAN HOMES COMMISSION; LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, JAMES A. BOSWELL, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE P. NEUHART; LARRY JEFTS, WILLIAM F. PFEIL,	JUDGMENT FILED OCTOBER 12, 1994 GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED NOVEMBER 28, 1994, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN, FILED ON MARCH 31, 1995 The Honorable Boyd P. Mossman, Judge Second Circuit Court

[Caption continued on next page]

EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE NEUHART

HAWAIIAN RESEARCH, LTD., GRANT SCHULE, SEIZEN J. BONK, NAFETALAI OTO,

Defendants-Appellees,

and

MARY K. MAMUAD, HERMAN K. PU'AA, LORRAINE M. VINCENT, LILLIAN K. AKINA, RONALD K. AKINA, HENRIETTA M. DAVIS, MATTHEW K. ADOLPHO, JR., JOHN K. KAPU III, JULIA KELIIKULI-PETERS, TOMI LOU MAMUAD, OR THEIR SUCCESSORS AND ASSIGNS; JOHN DOES 1 THROUGH 100, DOE CORPORATIONS 1 THROUGH 100 and DOE GOVERNMENTAL AGENCIES 1 THROUGH 100,

Defendants.

NO. 19154

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, vs. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission; et al., Defendants-Appellees, and MARY K. MAMUAD, et al., Defendants.	CIVIL NO. 94-0305(3) APPEAL FROM AMENDED JUDGMENT, ON ALL CLAIMS BY ALL PARTIES IN THIS ACTION, FILED ON JULY 18, 1995 AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 12, 1994, GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED NOVEMBER 28, 1994, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN, FILED ON MARCH 31, 1995 The Honorable Boyd P. Mossman, Judge Second Circuit Court

LESSEE DEFENDANTS-APPELLEES' ANSWERING BRIEF

Come now Defendants-Appellees LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, JAMES A. BOSWELL, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, GEORGINA K. K. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE NEUHART (hereinafter collectively referred to as "Lessee Defendants-Appellees" where appropriate), by and through their attorneys, FUJIYAMA, DUFFY & FUJIYAMA, and respectfully submit their Answering Brief pursuant to Rule 28(c) of the Hawaii Rules of Appellate Procedure.

I. *INTRODUCTION/SUMMARY OF ARGUMENT:*

This appeal arises out of litigation brought by one group of Native Hawaiians against another group of Native Hawaiians (including Lessee Defendants-Appellees) over Third-Party Agreements (hereinafter "TPAs"), duly formulated and approved by the Department of Hawaiian Home Lands (hereinafter "DHHL") and the Hawaiian Homes Commission (hereinafter "HHC") granting revocable licenses to certain non-Native Hawaiians (i.e., Licensee Defendants-Appellees) to assist Native Hawaiians in making meaningfully beneficial use of agricultural homestead leases pursuant to the Hawaiian Homes Commission Act of 1920 (hereinafter "HHCA"), 48 U.S.C. §§ 691 *et seq.*, and the Admission Act of 1959 (hereinafter "Admission Act"), 48 U.S.C. Prec. § 491.

Without any evidence of the nature of the TPAs except for the TPAs themselves, Plaintiffs-Appellants LEIFF KOA BUSH, MARTIN D.L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE (hereinafter collectively referred to as "Plaintiffs" where appropriate) have alleged that the TPAs are improper because, in Plaintiffs-Appellants' view, they are actually subleases in violation of HHCA §§ 208(4) and 208(5). Plaintiffs-Appellants also contend that taxation of costs would be improper in the event that this Court agrees with their position on this appeal and at any rate, should be reversed as to an award of $848.91 for computer-assisted legal research charges ("CALR").

However, as more fully set forth below, the circuit court's summary judgment should be affirmed as to Lessee Defendants-Appellees for reasons including, but not limited to, the following.

First, Plaintiffs-Appellants have failed to meet their burden of establishing a genuine issue of material fact in the absence of specific evidence that the TPAs are anything other than licenses. Such licenses are a permissible part of a Lessee's right of "use" as set forth in HHCA § 208(4) and are not subleases within the meaning of HHCA § 208(5) and are consistent with intent of these provisions. Under such circumstances, Lessee Defendants-Appellees were entitled to summary judgment as a matter of law.

Second, Plaintiffs-Appellants' claims herein are barred by the doctrine of unclean hands where they would engage in the same type of transactions that they challenge in this case.

Third, the Court's taxation of CALR costs was proper where the recent trend is to recognize that CALR is a normal, economical and reasonable expense in modern legal research necessitated in defending against litigation and such taxation is supported by the equities in this case.

II. *STATEMENT OF THE CASE:*

A. *Factual Background.*

The following material facts are undisputed.

1. *Lessee Defendants-Appellees.* Lessee Defendants-Appellees are each Native Hawaiian beneficiaries and holders of agricultural leases pursuant to the HHCA. R.I at 6.[1] Lessee Defendants-Appellees have each entered into TPAs with one or more of Licensee Defendants-Appellees on agreements duly formulated and approved by the Department of Hawaiian Home Lands (hereinafter "DHHL") and the Hawaiian Homes Commission (hereinafter "HHC"). *Id.* at 6-7.

2. *Subject TPAs.* As admitted by Plaintiffs-Appellants in their Opening Brief at 2:

> A Third Party Agreement is an agreement whereby the lessee of an agricultural homestead allows a stranger to the lease to use his or her land for farming or pastoral purposes. Shortly after the first agricultural homestead lots were awarded in the early 1920's in Hoolehua, lessees entered into these types of agreements with various pineapple companies, who occupied, used, and cultivated the lessees' agricultural homestead lots. (ROA.2:371-403). The Office of the Attorney General has opined that these types of agreements are legal under the HHCA even though the holder of the TPA may not be a native Hawaiian. (ROA.2:371-403). TPAs are presently allowed under the DHHL's administrative rules, provided that they receive approval from the HHC. *See* H.A.R. § 10-3-35.

Patterned after a model contract distributed by DHHL with its notice, the TPAs provide that they "shall be revocable at the will of the lessee" and that the lessee "may recall its land or cancel this agreement at any time and for any reason." R.II at 404-464. Eleven of the TPAs provide for "revocation" of the contracts on "notice" to the permittee of 365 days; three

[1]Record References are abbreviated. E.g., R. I at 6 reflects Record On Appeal, Volume I at page 6.

contracts provide for 180 days' notice; three provide for 120 days' notice; one provides for 30 days' notice, and three do not provide for any notice. Id. However, in response to the *Kealoha* state court decision, discussed *infra*, the contracts provide:

> Lessee and Third Party agree that this agreement is not, nor is it intended to be, a sublease or assignment or other transfer of Lessee's possessory interest in the permit area and that no interest whatsoever in the permit area land is hereby created on behalf of Third Party and that this Agreement is specifically revocable at the will of the Lessee.

Id.

The TPAs allow a third party "to use the permit area," *i.e.*, a specific part of the lease lot, for designated purposes. A majority of the TPAs describe the designated use as "farming"; other uses are stated as "[a]griculture (farming of fruits, vegetables & flowers)," "farming - crops (veg. & herbs)," "agricultural crops," "seed production," "grazing of animals," or "growing of agricultural crops." *Id.* All the TPAs provide that the "lessee and third party shall jointly enjoy use of the permit area," and require the third party to abide by the HHCA, the Department rules, and the terms of the lease. *Id.*[2]

There is no evidence of the intent of the TPAs in the record other than the TPA agreements themselves.

B. *Prior Litigation Involving The Subject TPAs.*

This is not the first time that Lessee Defendants-Appellees' TPAs have been the subject of stressful litigation.

1. *Prior Administrative Appeals.* On June 18, 1992, Plaintiffs-Appellants LEIFF KOA BUSH and MARTIN D.L. KAHAE, together with LAMBERT KALANI HAN, filed a Notice of Appeal, "on behalf of themselves and others similarly situated," to the Circuit Court of the Second Circuit, State of Hawaii, with regard to a May 19, 1992 decision of the Department of

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[2]Of the 22 TPAs, fourteen (495 acres) were with Licensee Defendant-Appellee LARRY JEFTS; two (70 acres) were with Licensee Defendant-Appellee WILLIAM PFEIL; four (145 acres) were with Licensee Defendant-Appellee HAWAIIAN RESEARCH LTD.; one (20.5 acres) was with Licensee Defendant-Appellee GRANT SCHULE; and one (298 acres) was with Licensee Defendants-Appellees Mr. and Mrs. WILLIAM ANDRADE. R.II at 404-464; *see also* R.I at 1-13.

Hawaiian Home Lands, State of Hawaii (hereinafter "DHHL") approving the Subject TPAs, in *Leiff Koa Bush, et al. vs. Hawaiian Homes Commission, et al.*, Civil No. 92-0463(2) (Haw. 2d Cir.). R.I at 77-89. This administrative appeal was consolidated with a second administrative appeal, filed on August 26, 1992, from a denial of a contested case hearing on the "third party agreements" issue, in *Leiff Koa Bush, et al. vs. Hawaiian Homes Commission, et al.*, Civil No. 92-0603(3) (Haw. 2d Cir.), and both appeals (hereinafter "Prior Administrative Appeal") concerned the propriety of such TPAs under the HHCA and Admission Act. R.I at 91-105.

A dismissal of that administrative proceeding was affirmed on May 3, 1994 by the Hawaii Supreme Court in *Bush v. Hawaiian Homes Commission*, 76 Haw. 128, 870 P.2d 1272 (1994), without prejudice to the instant action.

2. *Han Litigation.* On June 29, 1992, LAMBERT KALANI HAN and others filed a "Complaint For Civil Rights," purporting to assert rights of themselves and "the native Hawaiian population," against various public and private Defendants, including Lessee Defendants, in connection with allegations that the Subject TPAs and actions by the HHC/DHHL over the years 1980 through 1992 violated HHCA and the Admission Act, in *Lambert Kalani Han, et al., vs. Department of Justice, et al.* (hereinafter "Prior Action"), Civil No. 92-00406, in the United States District Court for the District of Hawaii. R.I at 107-128, 130-150.

On February 24, 1993, the Honorable David A. Ezra entered an order dismissing the Prior Action with prejudice. *Han v. Department of Justice*, 824 F. Supp. 1480 (D. Haw. 1993), and on March 4, 1993, the District Court entered a Judgment In A Civil Case on the February 24, 1993 order in favor of Lessee-Defendants-Appellees and/or their predecessors in interest. R.I at 152-79. Upon an appeal to the United States Court of Appeals for the Ninth Circuit from the March 4, 1993 Judgment, giving rise to *Lambert Kalani Han, et al., vs. Department of Justice, et al.*, Docket No. 93-15632 (hereinafter "Ninth Circuit Appeal"). R.I at 181-82. On or about July 27, 1993, Plaintiffs-Appellants LEIFF KOA BUSH and MARTIN D. L. KAHAE, through their present counsel, filed an amicus brief in the Ninth Circuit Appeal, asserting that they "share the interests of Plaintiffs Han, et al." R.I at 184-85.

The Ninth Circuit Appeal resulted in an affirmance of the District Court's dismissal in favor of Lessee Defendants-Appellees. *Han v. Department of Justice*, 45 F.3d 333 (9th Cir. 1995).

C. *Subject Litigation/Procedural History.*

1. *Complaint.* On May 4, 1994 *(after Han v. Department of Justice*, 824 F. Supp. 1480 (D. Haw. 1993) and *Bush v. Hawaiian Homes Commission*, 76 Haw. 128, 870 P.2d 1272 (1994)), Plaintiffs-Appellants filed a Complaint For Declaratory and Injunctive Relief in the instant action against several public and private defendants, including Lessee Defendants, asserting that the same TPAs and the same actions of the HHC/DHHL violate HHCA § 208(4) and HHCA § 208(5), as incorporated into Sections 4 and 5 of the Admission Act. R.I at 1-13.

2. *Lessee Defendants-Appellees' Prior Motion.* On July 14, 1994, Lessee Defendants-Appellees filed a Motion To Dismiss Complaint For Declaratory And Injunctive Relief Filed 05/04/94 Or, In The Alternative, For Summary Judgment Or, In The Alternative, For Stay Of Proceedings, asserting that the doctrines of res judicata and/or collateral estoppel barred the instant litigation as a matter of law. R.I at 52-201. After opposition and reply memoranda, that Motion was heard on September 7, 1994 and, over Lessee Defendants-Appellees' objection, taken under advisement to allow Plaintiffs-Appellants to file an anticipated motion for summary judgment. Tr. 09/07/94 at 49-52.

3. *Plaintiffs-Appellants' Motion For Summary Judgment.* On October 12, 1994, Plaintiffs-Appellants filed a Motion For Summary Judgment, asserting that there was no genuine issue of material fact and that Plaintiffs-Appellants were entitled to judgment as a matter of law. R.II at 292-496.

4. *State Defendants-Appellees' Motion For Summary Judgment/Lessee Defendants-Appellees' Joinder.* On November 28, 1994, the State Defendants-Appellees filed a Motion For Summary Judgment asserting, among other things, that Plaintiffs-Appellants have failed to meet their burden of establishing a genuine issue of material fact in the absence of specific evidence that the TPAs are anything other than licenses and that such licenses are a permissible part of a Lessee's right of "use" as set forth in HHCA § 208(4) and are not subleases within the meaning of HHCA § 208(5) and are consistent with intent of these provisions. R.III at 553-705. On November 30, 1994, Lessee

Defendants-Appellees filed a Joinder in the State Defendants-Appellees Motion For Summary Judgment, seeking the same relief. R.III at 712-17.

5. *Lessee Defendants-Appellees' Opposition To Plaintiffs-Appellants' Motion For Summary Judgment.* On December 9, 1994, Lessee Defendants-Appellees filed a Memorandum In Opposition to Plaintiffs-Appellants Motion For Summary Judgment Filed 10/12/94, asserting, among other things, that Plaintiffs-Appellants' Motion should be denied where Plaintiffs-Appellants bear the burden of proof on their claims and have not sustained this burden. R.IV at 792-806.

6. *Hearing, Orders Costs and Judgment.* The foregoing Motions and Lessee Defendants-Appellees' Joinder came on for hearing on December 12, 1994 before the Honorable Boyd P. Mossman and, at the close of the hearing, the court issued an oral ruling in favor of Defendants-Appellees. Tr. 12/12/94.

On February 6, 1995, Lessee Defendants-Appellees filed a Notice Of Taxation Of Costs and Bill Of Costs in the amount of $1,592.38, which included $848.91 in Westlaw charges. R.IV at 831-48. On February 16, 1995, Plaintiffs-Appellants filed a Memorandum objecting solely to the Westlaw component of that Bill of Costs. R.IV at 870-77. On March 30, 1995, the circuit court entered an Order Taxing Costs in favor of Lessee Defendants-Appellees in the amount of $1,592.38, which included $ 848.91 in CALR charges. R.V at 1019-21.

On March 31, 1995, the circuit court entered an Order Denying Plaintiffs' Motion For Summary Judgment Filed October 12, 1994, Granting State Defendants' Motion For Summary Judgment Filed November 28, 1994 And Granting Private Joinders Therein and a Judgment on that Order. R.V at 1022-30.

7. *Prior Appeal.* On April 7, 1995, Plaintiffs-Appellants filed a Notice Of Appeal, which was docketed as *Leiff Koa Bush v. Kali Watson, et al.*, No. 18908, on May 17, 1995. R.V at 1111-22. By Order Of Dismissal entered on June 13, 1995, the Hawaii Supreme Court dismissed that Prior Appeal on the basis of prematurity under HRCP Rule 58 and *Jenkins v. Cades Schutte Fleming & Wright*, 76 Haw. 115, 869 P.2d 1334 (1994).

8. *Amended Judgment.* Upon an ex-parte motion filed by Plaintiffs-Appellants on July 10, 1995, the circuit court entered an Amended Judgment on July 18, 1995, from which the instant appeal (No. 19154) arises. R.VI at 1228-30.

III. *COUNTER-STATEMENT OF STANDARD OF REVIEW:*

On appeal from a grant of summary judgment, the appellate court applies the same standard as the lower court. *Housing & Finance Development Corp. v. Castle*, 79 Haw. 64, 75, 898 P.2d 576, 587 (1995). Under Rule 56 of the Hawaii Rules of Civil Procedure (hereinafter "HRCP"), summary judgment is properly entered where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. Under HRCP Rule 56(e), the party opposing a summary judgment motion cannot rely upon allegations stated in the complaint; it must set forth specific facts showing that there is a genuine issue for trial. *Henderson v. Professional Coatings Corp.*, 72 Haw. 387, 400-01, 819 P.2d 84, 92 (1991); *K.M. Young & Associates, Inc. v. Cieslik*, 4 Haw. App. 657, 664, 675 P.2d 793, 799 (1983).

Bare allegations, speculation or factually unsupported conclusions are insufficient to raise a genuine issue of material fact and, therefore, insufficient to reverse a grant of summary judgment. *Housing & Finance Development Corp. v. Castle*, 79 Haw. 64, 91, 898 P.2d 576, 603 (1995).

Additionally, the plain language of HRCP Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element necessary to that party's case and on which that party will bear the burden of proof at trial. *Hall v. State of Hawaii*, 7 Haw. App. 274, 284, 756 P.2d 1048, 1050 (1988) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). In such a situation, there can be no genuine issue of material fact. *Id.; see also First Hawaiian Bank v. Weeks*, 70 Haw. 392, 396-97, 772 P.2d 1187, 1190 (1989) (citing *Celotex* with approval).

In other words, an opposing party who cannot show that countervailing evidence will be available at trial is not entitled to a denial of a motion for summary judgment on the basis of a hope that such evidence will develop at trial. *Henderson v. Professional Coatings Corp.*, 72 Haw. 387, 401, 819 P.2d 84, 92 (1991); *State v. Midkiff*, 49 Haw. 456, 459, 421 P.2d 550, 554 (1966); *Waimea Falls Park, Inc. v. Brown*, 6 Haw. App. 83, 95, 712 P.2d 1136, 1144 (1985).

Under HRCP Rule 54(d), costs are awarded to a prevailing party as of course and an award of a specific item of costs to the prevailing party is within the sound discretion of the trial court. *Harkins v. Ikeda*, 57 Haw. 378,

557 P.2d 788 (1976). In order to establish an abuse of discretion, the appellant must show that "the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." *Amfac, Inc. v. Waikiki Beachcomber Investment Co.*, 74 Haw. 85, 114, 839 P.2d 10, 26 (1992), *recon. denied*, 74 Haw. 650, 843 P.2d 144 (1992).

IV. *COUNTER-STATEMENT OF QUESTIONS PRESENTED:*

A. Whether Plaintiffs-Appellants have met their burden of establishing that the grant of a license is not a "use" within the meaning of HHCA § 208(4).

B. Whether Plaintiffs-Appellants have met their burden of establishing that a TPA is a "sublease" within the meaning of HHCA § 208(5) as opposed to a revocable license.

C. Whether Plaintiffs-Appellants' claims are barred by the doctrine of "unclean hands" where they would engage in the same type of conduct that they challenge in the instant case.

D. Whether the trial court abused its discretion in awarding Lessee Defendants-Appellees $848.91 in costs for CALR charges where CALR is a normal part of modern legal research and such an award is supported by the equities of this case.

V. *ARGUMENT:*

The circuit court's summary judgment should be affirmed as to Lessee Defendants-Appellees for reasons including, but not limited to, the following.

A. *Historical Background Of TPAS Under The HHCA/ Admission Act.*

The HHCA was enacted by Congress in 1921 with its "primary purpose" being "the rehabilitation of native Hawaiians." *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 336, 640 P.2d 1161, 1167 (1982). Beneficiaries of the Act include those persons "of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," HHCA § 201(7), as well as their immediate descendants, HHCA § 209 (Supp. 1992). The legislation authorizes a "homestead" program for these Hawaii natives to be established on certain "available lands" pursuant to the Act's terms. *Id.* §§ 203, 207, 208, 209. Under § 207(a) of the Act, the DHHL "is authorized to lease to native Hawaiians home lands" of "not more than forty acres of agricultural lands or lands used for aquaculture purposes";

"not more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands"; or "not more than one acre of any class of land to be used as a residence lot." HHCA § 208 states the conditions on which leases are granted. In particular, §§ 208(3), (4) and (5) provide, in relevant part:

> The lessee may be required to occupy and commence to use or cultivate the tract as the person's home or farm ..., as the case may be, within one year after the lease is made.
>
> The lessee shall thereafter, for at least such part of each year as the department shall prescribe by rules, so occupy and use or cultivate the tract on the person's behalf.
>
> The lessee shall not in any manner transfer to, or otherwise hold for the benefit of, any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department, or agree to so transfer, or otherwise hold, the person's interest in the tract. Such interest shall not, except in pursuance of such a transfer to or holding for or agreement with a native Hawaiian or Hawaiians approved of by the department, or for any indebtedness the payment of which has been assured by the department, including loans from other agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet the person's interest in the tract or improvements thereon.

Under HHCA § 210, "[w]henever the department has reason to believe that any condition enumerated in section 208, or any provision of section 209, of this title has been violated, the department shall give due notice," and if, after providing due process, "the department finds that the lessee or his successor has violated any condition in respect to the leasing of such tract, the department may declare his interest in the tract and all improvements thereon to be forfeited and the lease in respect thereto canceled[.]" To enforce this mandate and for other purposes, the DHHL has power to "adopt rules and regulations and policies [via Hawaii's Administrative Procedure Act, Haw. Rev. Stat. Ch. 91]." HHCA § 222.

The Hawaiian Home Lands themselves consist of roughly 220,000 acres out of approximately 1.8 million acres that were ceded to the United States by the Republic of Hawaii at the time of annexation, and accepted by the United States pursuant to the Newlands Resolution. 30 Stat. 750 (1898). Until set aside by the HHCA, these 220,000 acres were governed by the Newlands Resolution and § 91 of the Organic Act, Act of April 30, 1900, 31 Stat. 141 (1900). Upon Statehood, management of the Home Lands was transferred to Hawaii by § 4 of the Admission Act:

> As a compact with the United States relating the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

73 Stat. 4, 5 (Mar. 18, 1959). In Section 5(b) of the Admission Act, Congress granted to the new State of Hawaii full "title" "to all lands defined

as 'available lands' by section 203 of the Hawaiian Homes Commission Act, 1920, as amended." 73 Stat. at 6. These lands are in turn mandated by Section 5(f) of the Admission Act to be held "together with the proceeds from the sale or other disposition of any such lands and the income therefrom" by the State of Hawaii as a public trust for "one or more" of five purposes: (1) "support of the public schools and other public educational institutions"; (2) "betterment of the conditions of native Hawaiians,"; (3) "development of farm and home ownership on as widespread a basis as possible"; (4) "making of public improvements"; or (5) "provision of lands for public use." 73 Stat. at 6. A failure to manage and dispose of land reverting under §§ 5(b)-(e) "for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide" "shall constitute a breach of trust for which suit may be brought by the United States." 73 Stat. at 6

This case arises out of actions taken by the HHC to maximize the value of lease lands under the Act. As is well documented, the HHCA has never provided federal funding for homes and infrastructure; improvements must be made from rents collected on certain lands subject to § 5(f) of the Admission Act,[3] from rents on Home Lands from non-beneficiaries,[4] from State funds,[5] and from lessees' own pockets and creditors.[6] For much of its history, especially in the pre-Statehood period, 1921-59, the statutory funds established by Congress, through the use of ceiling and caps upon fund accounts into which revenues from the Home Lands were paid, actually prohibited the Hawaiian Homes Commission from making full use of the Home Lands. *See e.g.*, 42 Stat. at 112. Indeed, under the caps, the Hawaiian Homes program has been a "net exporter" of capital

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[3]HHCA §§ 213(a)(1), 213(b)(8) (1985).

[4]HHCA § 204(2) (1985). *See generally Ahia v. Department of Transportation*, 69 Haw. 538, 751 P.2d 81 (1988).

[5]HHCA §§ 213(a)(3), 213(a)(4), 213(a)(5), 213(a)(6).

[6]*See generally* Administration of Native Hawaiian Home Lands, Joint Hearings Before the Select Committee on Indian Affairs, United States Senate, and the Committee on Interior and Insular Affairs, House of Representatives, 100th Cong., 1st Sess. 70 (August 7, 1989) (testimony DHHL Chairman Ilima Pi'ianaia) ("conservative estimate" of the funding required in 1989 dollars to construct homes and infrastructure necessary to distribute available lands to all on the waiting list is $500 million).

to other territorial and state departments and agencies for much of the history of the program.[7]

Lack of income has driven HHCA lessees to seek to enter into various arrangements with private agricultural businesses to maximize the present earning power of the lease lots. These TPAs trace their origins almost to the program's inception. Opinions by the Hawaii Attorney General in 1924 and 1926 authorized HHCA lessees to enter into contracts of "cultivation and sale" with pineapple companies which could grant the company "'the right to enter upon the land, take possession of the crops, and mature and harvest same,'" so long as security for any lessee's denial of the contracted rights was not described as a "mortgage lien."[8] In the 1940s and 50s, Attorney General opinions approved of standard "cooperative block planting agreement" forms, relying on amendments to the HHCA (50 Stat. 504 (July 10, 1937)) that recognized the existence of such agreements by acknowledging the lessee's interest in "growing crops and agricultural stock (either on the tract or in any collective contract or program to which the lessee is a party by virtue of his interest in the tract or tracts)." HHCA § 209(a); see also, id. § 216(c) (granting Department as creditor "first lien upon the borrower's or lessee's interest in growing crops,... either on his tract or share in any collective contract or program.").[9]

Lower courts also generally agreed that TPAs serve a useful purpose and acknowledge the native Hawaiian lessees' autonomy and capacity to contract. In *Adolpho v. Kealoha*, Civil No. 243 (Haw. 2d Cir.) (October 18, 1960)

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[7]As is documented elsewhere, many thousands of acres of land were also illegally transferred out of the trust via Executive Orders and Governor's Proclamations, mainly during the Territorial period. These transfers, to the extent possible, were overturned by Governor Ariyoshi in the early 1980s. *State of Hawaii ex rel. Attorney General v. United States*, 676 F. Supp. 1024 (D. Haw. 1989), *aff'd*, 866 F.2d 313 (9th Cir. 1989) (per curiam).

[8]Letter of September 23, 1924 from Deputy Attorney General C. B. Dwight to R. M. Duncan, *reprinted in* Letter dated March 29, 1955 from Deputy Attorney General Robert K. Fukuda to the Honorable William H. Heen; Letter of October 28, 1926, from Attorney General W. B. Lymer to R. M. Duncan, *reprinted in* State Exh. "4", R.III at 661-701.

[9]Letters of March 31, 1945 from C. Nils Tavares to Eugene S. Capellas; of March 29, 1955 from Deputy Attorney General R. K. Fukuda to the Honorable William Heen. R.III at 661-701.

(R.III at 679-701) the state circuit court upheld under § 208(5) a contract granting California Packing Company power as the lessees' "mutual agent to direct and control the planting, cultivating, harvesting and hauling of pineapples, to be grown on the arable lands of the [lessees]." *Id.* at 2. The packing company was given exclusive buying rights and rights to the planting materials, and the lessees were to be paid fixed prices and advances against the harvest. *Id.* at 3. In lieu of giving a lien on the crop, the lessees pledged that if they failed to permit the harvesting or otherwise failed to deliver the pineapples "when ready for harvesting," the lessees would be "obligated to repay the Buyer the proportion of the moneys advanced." *Id.* The court upheld the contracts relying on holdings in other cases involving native Americans on the mainland, who were similarly barred from transferring interests in their allotments, to the effect that contracts for sale of growing crops were not sales of "an interest in land." *Id.* at 11 (citing *McClain v. Miller* 149 P. 399 (Kan. 1915)). The court held that "[n]othing has been pointed out either within or without the contract a indicating on the part of either party, an intention to 'transfer' or 'acquire' an interest in the land." *Id.* As the Court found (*id.* at 13):

> Detailed reports which carefully explained the contracts and reasons why the Hawaiian Homes Commission had given their approval have been made to Congress from time to time; no legislation has been acted to show any contrary intention, therefore, it is reasonable to assume that Congress, which has both farmers and lawyers within its membership, does not consider this agreement as anything more than a cropping or cultivation contract and sales agreement and as not conveying or transferring any interest in land.

See id. 17 (distinguishing *In re Henderson*, 21 Haw. 104 (1916)).

The impetus to secure TPAs accelerated recently on Molokai, where many original 99-year leases are in their 60th year or more. Many lessees are thus elderly, and "the tendency of young generations of native Hawaiians [is] to avoid farm work." *Ahuna*, 64 Haw. at 330 n.4, 640 P.2d at 1163-64 n.4. As one Commissioner thus noted, "Molokai leases are the earliest made by the department[;] therefore, many of the lessees are elderly and physically unable to work the land themselves." Minutes of May 19, 1992 Meeting of Hawaiian Homes Commission, R.III at 586-88.

Sensitive to the issues underlying third-party agreements, the DHHL has promulgated a rule providing that "[n]o lessee may, without written approval from the commission, enter into any contract, joint venture, agreement or other arrangement of any sort with a third person on lands covered by lessee's lease for the cultivation of crops or the raising of livestock." Haw. Admin. R. § 10-3-35, *printed in* Letter of December 3, 1991 from Hoaliku Drake to Lessees (R.III at 643-46). On December 3, 1991, the DHHL moved to enforce the rule by notifying lessees that they were required to obtain approval of the HHC. *Id.*

As a result, various lessees, principally from Molokai, submitted requests for approval by the HHC at a meeting on May 19, 1992 in Lihue, Kauai. R.III at 586-88. HHC members heard oral statements from several persons concerned about the agreements. Professor Joseph Ching specifically criticized the Jefts' agreements as giving rise to the "recolonization of Hawaii." Minutes of May 19, 1992 Meeting of Hawaiian Homes Commission (*Id.*). Others also criticized the agreements. *Id.*

HHC nonetheless approved these particular agreements, having been advised orally by a Deputy Attorney General "that the commission's consideration and action on the question of third party agreements is legal." *Id.* On June 29, 1992, the Department of the Attorney General issued a formal opinion approving third-party agreements only under specified conditions. R.III at 651-60. The opinion states that a homesteader must be permitted to "terminate the permit for any reason upon notice which is reasonable under the circumstances, for example long enough notice to allow a recently-planted crop to mature." The HHC must also weigh the probable risks and benefits to the overall welfare of the lessee community in issue: and agreements should not be approved which contain terms that "prevent, or in any way interfere with, the continued exclusive occupancy of the entire homestead by the homesteader." *Id.* at 4, 9. Plaintiffs in this case did not participate in the May 19, 1992, proceedings before the Commission at which the agreements were approved. Subsequently, they participated in a June 30, 1992 meeting, where the Commission voted (1) to reaffirm the legality of the third-party agreements; and (2) to deny a contested case hearing.

Plaintiffs then sued in the Circuit Court under the Administrative Procedure Act, which suit was dismissed for want of jurisdiction. *Bush v. Hawaiian Homes Commission*, 76 Haw. 128, 870 P.2d 1272 (1994).

B. *Plaintiffs-Appellants Have Not Met Their Burden Of Establishing That The Grant Of A TPA License Is Not A "Use" Within The Meaning Of HHCA § 208(4).*

Plaintiffs-Appellants contend that the TPAS violate HHCA § 208(4)'s provision that a lessee "occupy and use or cultivate the tract on his own behalf" which Plaintiffs-Appellants read to require that the lessee must occupy and use or cultivate the tract on his own behalf "personally." This strained construction of HHCA § 208(4) is without merit for the reasons stated by the State Defendants-Appellees and, additionally, the following.

1. *TPAs Are A Proper "Use".* Where a common law concept is enacted in a statute, "that is a clue that the courts are to interpret and apply the statute with the freedom with which they would construe and apply a common law principle." *Grain Dealers Mutual Insurance Co. v. Pacific Insurance Co.*, 70 Haw. 211, 215, 768 P.2d 226, 228 (1989) (citation omitted).

In the instant case, HHCA § 208(4) incorporates a common law concept, namely a lessee's right to "use" of the demised premises. In comparison, it is well settled common law that, subject to restrictions in the lease, the lessee's right to "use" includes the rights to use through agents and servants, to convey the rights to use and to permit third persons to enter the demised premises. 49 Am. Jur. 2d *Landlord And Tenant* § 234 (1970).

In *Brewer v. Chase*, 3 Haw. 127 (1869), a lessor plaintiff contended that a lessee defendant had breached a covenant against "subletting" by allowing a third-party physician (Dr. McGrew) to occupy a building on the demised premises with the lessee. The court addressed this contention as follows:

> The point, however, was not raised in the argument, and it is unnecessary to decide here whether the present occupation, until a new lease or formal extension, is subject to the condition against sub-letting. But we are of the opinion that the act of the defendant in allowing Dr. McGrew to occupy the building with himself, is not a breach of such condition. *The original lease gave the free and unmolested use of the demised land*, with the privilege of removing the buildings that the lessee might erect. This implies an unrestricted use of such buildings for all lawful purposes. It was long since settled, that a covenant not to sub-let a tenement was not broken by taking lodgers, although they have exclusive possession of a room for a year or more.

A clause like this is always strictly construed; so that it may not extend beyond the express stipulation, and particularly so, in order to avoid a forfeiture.

Whether the defendant occupy exclusively the building which he erects, and has the right to remove, or not, cannot affect the value of the lot itself. To restrict the defendant to such exclusive use and occupation of his own buildings, would seem inconsistent with the terms of the lease, and we do not think it was so intended.

Id. at 140 (emphasis added; citations omitted).

In *Pires v. Phillips*, 31 Haw. 720 (1930), the Hawaii Supreme Court likewise held that the right to "use" of an agricultural leased premises in Makawao included the right to any "use" which does not diminish the value of the fee estate/reversion:

There is nothing in the lease which binds the lessee to use the premises for any particular purpose. *He may therefore use them for any purpose he pleases and may make changes in them that are necessary to adapt them to such purposes so long as he does not diminish their value to the reversion.*

Id. at 722 (emphasis added).

Even under *In re Henderson*, 21 Haw. 104 (1912), the case heavily relied upon by Plaintiffs-Appellants, "cultivation" or "use" by a lessee need *not* be limited to the lessee exclusively:

Although the clause does not expressly so state, it must be construed to mean that the cultivation is to be performed by the freeholder. *We do not mean by this that it is necessarily to be done by the freeholder with his own hands*, but that it must be done for him or by his agents or servants for him.

Id. at 117-18 (emphasis added).

When construed with the freedom of their common law meaning, "cultivation" or "use" of demised premises under HHCA § 208(4) includes the right to enter into TPAs subject to the regulatory approval of DHHL/HHC.

2. *TPAs Are Consistent With HHCA's Purpose.* Moreover, the reality is that this is the only construction which would achieve HHCA's goal of rehabilitation of Native Hawaiians. It is presumed that the drafters of a statute do not intend an absurd, unreasonable or unjust result and a statute

should not be construed to bring about such results where they can reasonably be avoided. *See Kapiolani Park Preservation Society v. City and County of Honolulu*, 69 Haw. 569, 751 P.2d 1022 (1988). As stated above, many lessees are unable to "personally" cultivate their agricultural lots for many reasons. Even if they are able to do so, such an approach would be economically suicidal in today's competitive marketplace.

The primary purpose of the HHCA is the rehabilitation of Native Hawaiians. *Ahuna v. Department Of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982). Perhaps the most troubling aspect of Plaintiffs-Appellants' contentions is that they ignore the fact that Lessee Defendants are also Native Hawaiian beneficiaries of the HCCA. This is not simply an intellectual debate on the policies of the State Defendants-Appellees in administering the HHCA. Lessee Defendants-Appellees are real people with real needs who suffer like any other beneficiary from interference with their decisions on the use of their leases, particularly where that interference is through repetitive and stressful litigation. In the TPAs, Lessee Defendants-Appellees are merely attempting, with the duly sought approval of DHHL/ HHC, to economically rehabilitate themselves through self-determination in the use of their HHCA leases.

The ultimate implications of Plaintiffs-Appellants' claims are frightening. Rather than rehabilitation of Native Hawaiians, Plaintiffs-Appellants instead seek to impose their own views upon Lessee Defendants-Appellees on how Lessee Defendants-Appellees should rehabilitate themselves on Lessee Defendants-Appellees' leases. More importantly, Plaintiffs-Appellants' views are economically unrealistic. To the extent they are true, Plaintiffs-Appellants' cries of hardship in the modern agricultural marketplace only highlight the wisdom of the TPAs as a responsive means of effectuating the intent of HHCA in the modern economy.

The alternative proposed by Plaintiffs-Appellants would not lead to the rehabilitation of Native Hawaiians; it would create yet another obstacle to the same by limiting lessees to uneconomical and self-defeating uses of their HHCA leases. This absurd result cannot have been intended by the drafters of the HHCA and, it is respectfully submitted, should not be condoned by this Court.

Consequently, Plaintiffs cannot meet their burden of establishing that the TPAs at issue here violate HHCA § 208(4).

C. *Plaintiffs-Appellants Have Not Met Their Burden Of Establishing That A TPA Is A "Sublease" Within The Meaning Of HHCA § 208(5).*

Plaintiffs also contend that the TPAs violate HHCA § 208(5)'s provision that a lessee "shall not sublet the person's interest in the tract or improvements thereon," which Plaintiffs read to prohibit the licenses set forth in the TPAs. This strained construction of HHCA § 208(5) is without merit for the reasons stated by the State Defendants-Appellees and, additionally, the following.

In *Brewer v. Chase*, 3 Haw. 127, 140 (1869), discussed and quoted *supra*, the Hawaii Supreme Court recognized that a covenant against "subletting" was not breached by the sharing of office space with a physician. Applying similar principles, courts have generally held that licenses to third parties do not constitute subletting. *See, e.g., Mann Theatres Corp. v. Mid-Island Shopping Plaza Co.*, 94 A.D.2d 466, 471-72, 464 N.Y.S.2d 793, 798 (1983), *aff'd*, 62 N.Y.2d 930, 468 N.E.2d 51, 479 N.Y.S.2d 213 (1984).

By their terms, the TPAs are revocable at will and do not convey any property interest from the lessee. In *Ideta v. Kuba*, 21 Haw. 751 (1913), the Hawaii Supreme Court held that a similar agreement was merely a license *revocable at will* and did not create an easement with respect to a right of way.

> In our judgment the case presents an illustration of a simple parol license bare of any special or complicating features – a mere personal privilege – which under all the authorities is *revocable at the will of the licensor*. 1 Washburn, Real Prop. (5th ed) 632; 25 Cyc. 645. We conclude that the respondent was acting within his rights in the premises when he revoked the license, that *his right to revoke it was subject to no condition*, and that the complainant failed to show that he was entitled to the injunction sought.

Id. at 755 (emphasis added). Moreover, the concurring opinion of Justice De Bolt suggests the same conclusion.

> I am inclined to the view that the record shows that the new right of way is an executed license; *but the great weight of authority is, as I believe, that neither the execution of the license, nor the incurring of expense, nor both combined, affect the right of the licensor to revoke.*

Id. at 755-66 (emphasis added; citations omitted).

Ideta and other decisions of the Hawaii Supreme Court set forth the general rule that a "license," by definition, is revocable at the will of the putative "licensor" and does not convey any property interest. In *Kamehameha v. Nahaolelua*, 2 Haw. 378 (1861), the plaintiff brought a trespass action against certain defendants with respect to their entry on a property located in Lahaina. The defendants in turn contended that the Plaintiffs' guardian had granted a public right of way with respect to the property. In rejecting this contention, the Hawaii Supreme Court held that the mere fact that the guardian had permitted defendants to use the way did not convey any property interest in the way.

> [O]n the contrary, it appears to us that the re-opening of the way over the plaintiff's premises, by Mr. Ii, amounted to nothing more than a renewal of the former *permissive use*, which had been temporarily interrupted; and being in law not a dedication, but merely a license revocable, the plaintiff may revoke the license at his pleasure, and resume the possession of the *locus in quo*.

Id. at 381 (emphasis in original). *See also Kapiolani Park Preservation Society v. City & County Of Honolulu*, 69 Haw. 569, 579, 751 P.2d 1022, 1028-29 (1988) (a license is revocable at the will of the licensor); *McCandless v. John Ii Estate*, 11 Haw. 777, 788-89 (1899) (a license is revocable at the will of the licensor).

Plaintiffs have not introduced any extrinsic evidence that the TPAs are anything other than a license revocable at the will of the lessee. Even if they had, such evidence would be inadmissible under the parol evidence rule. *See MPM Hawaiian, Inc. v. World Square*, 4 Haw. App. 341, 666 P.2d 622 (1983). Such licenses do not constitute "subletting" or "conveyance of a property interest."

In short, Plaintiffs-Appellants' position is supported solely by bare allegations, speculation and/or factually unsupported conclusions that are insufficient to raise a genuine issue of material fact and, therefore, insufficient to reverse a grant of summary judgment. *See Housing & Finance Development Corp. v. Castle*, 79 Haw. 64, 91, 898 P.2d 576, 603 (1995).

Consequently, Plaintiffs cannot meet their burden of establishing a violation of HHCA § 208(5).

D. *Plaintiffs-Appellants' Claims Are Barred By The Doctrine Of "Unclean Hands" Where They Would Engage In The Same Type Of Conduct That They Challenge In The Instant Case.*

Assuming *arguendo* (but not admitting) that Plaintiffs-Appellants have established that TPAs violate HHCA § 208(4) or § 208(5), their claims would nevertheless be barred by the doctrine of unclean hands.

In *Hewitt v. Waikiki Shopping Plaza*, 6 Haw. App. 387, 722 P.2d 1055 (1986), the plaintiff (Hewitt) brought an action against the owner of a shopping plaza (WSP) on the basis that the shopping plaza's tenants were wrongfully using a street (Lauula Street) commonly owned by both parties. In rejecting the plaintiffs' claim, the Hawaii Intermediate Court of Appeals (hereinafter "ICA") held that the plaintiff did not come into the case with "clean hands" in that he was guilty of the same type of conduct that it was asserting against the owner:

> The trial court was also correct in holding that Hewitt did not come into this case with "clean hands." Hewitt's lessee, Dollar, uses Lauula Street for access to and from Lot 82 in spite of the fact Lot 82 has access directly onto Royal Hawaiian Avenue. Additionally, Lauula Street is being used by Dollar as access for Lot 81 which is non-adjacent to Lauula Street, although there is nothing about Hewitt's title to Lot 81 or his lease to Dollar that entitles either of them to use Lauula Street for such purpose.

Id. at 396, 722 P.2d at 1061.

In the instant case, Plaintiffs-Appellants similarly do not come into court with "clean hands" in that they would engage in the same type of conduct as they challenge. The testimony of Plaintiff-Appellant MARTIN KAHAE, in Paragraphs 10, 11, and 12 of an Affidavit filed in support of Plaintiffs-Appellants' position in the lower court, that Plaintiffs-Appellants would *transfer their interests* to HUI LAULIMA, which is a cooperative farming organization which, aside from racial considerations, is comparable to the operation of Licensee Defendants-Appellees. R.II at 324. In other words, Plaintiffs-Appellants inconsistently argue that Lessee Defendants-Appellees' use of their leases must be exclusive, but theirs need not be exclusive.

Under these circumstances, it is respectfully submitted that Plaintiffs-Appellants' claims are barred by the doctrine of "unclean hands" as a matter of law.

E. *Plaintiffs-Appellants Have Not Established That The Trial Court Abused Its Discretion In Awarding Lessee Defendants $848.91 In Costs For CALR Charges.*

Plaintiffs-Appellants correctly note that HRS § 607-9 was amended in 1989. The 1989 Amendment "abrogated" nearly all of the prior case law regarding limitations on costs awards, in favor of a more liberal approach. *See Tradewind Hotels, Inc. v. Cochran*, 8 Haw. App. 256, 271 n.12, 799 P.2d 60, 69 n.12 (1990). Consequently, as amended, HRS § 607-9 currently provides the court with broad discretion regarding including expenditures within the category of "taxable" costs and also considering the equities of the case:

> Cost charges exclusive; disbursements. No other costs of court shall be charged in any court in addition to those prescribed in this chapter in any suit, action, or proceeding, except as provided by law.
>
> *All actual disbursements, including but not limited to*, intrastate travel expenses for witnesses and counsel, expenses for deposition transcript originals and copies, *and other incidental expenses*, including copying costs, intrastate long distance telephone charges, and postage, sworn to by an attorney or a party, and deemed reasonable by the court, *may be allowed in taxation of costs. In determining whether and what costs should be taxed, the court may consider the equities of the situation.*

(Emphasis added).

In contrast to the legislative intent of inclusiveness, Plaintiffs-Appellants would have this court adopt an "exclusive" approach with regard to CALR charges and rely upon several cases for the proposition that CALR costs are not taxable as costs.

However, the better and more recent view is that CALR charges for services such as Westlaw or Lexis are a normal, economical, and reasonable part of the defense of a case in modern times and thus should be taxable as costs.

In *Robinson v. Ariyoshi*, 703 F. Supp. 1412, 1435-36 (D. Haw. 1989), *vacated on other grounds*, 933 F.2d 781 (9th Cir. 1991), the Honorable Martin Pence insightfully and perceptively hailed the inherent efficiency of CALR in holding that such costs are taxable under the federal counterpart of HRCP Rule 54(d):

> Lexis is an essential tool of a modern efficient law office. As such, it saves lawyers' time by increasing the efficacy of legal research. Denial of reimbursement for Lexis charges in a proper case would be an open invitation to law firms to use high-priced attorney time to perform routine research tasks that can be accomplished quicker and more economically with Lexis. This, in turn would lead inevitably to increased staffing of civil rights cases, and thus to larger fee awards. The Court will, therefore, treat Lexis charges as taxable.

(Citation omitted).

Similarly, in *In Re Continental Illinois Securities Litigation*, 962 F.2d 566, 570 (7th Cir. 1992), the United States Court of Appeals for the Seventh Circuit held that the district court *erred* in refusing to award CALR expenses:

> The judge refused to allow the lawyers to bill any of their out-of-pocket expenses of using a computerized legal research service (LEXIS). He thought those expenses should be part of the lawyers' overhead. *This was another clear error. If computerized research expense were customarily treated in this fashion, lawyers' hourly rates would be even higher than they are, requiring an adjustment in the lodestar. But the more important point is that the market – the paying, arm's length market – reimburses lawyers' LEXIS and WESTLAW expenses, just as it reimburses their paralegal expenses, rather than requiring that these items be folded into overhead.* Markets know market values better than judges do. And as with paralegals, so with computerized research: if reimbursement at market rates is disallowed, the effect will be to induce lawyers to substitute their own, more expensive time for that of the paralegal or the computer.

(Citations omitted; emphasis added). As stated in *United Nuclear Corp. v. Cannon*, 564 F. Supp. 581, 591-92 (D. R. I. 1983):

> Lexis is an essential tool of a modern, efficient law office. As such, it saves lawyers' time by increasing the efficacy of legal research. Denial of reimbursement for Lexis charges in a proper case would be an open invitation to law firms to use high-priced attorney time to perform routine research tasks that can be accomplished quicker and more economically with Lexis.

See also Harman v. Lyphomed, Inc., 945 F.2d 969, 976 (7th Cir. 1991) (finding reversible error in denial of CALR costs; CALR costs are compensable because they reduce attorney time); *Gottlieb v. Wiles*, 150 F.R.D. 174, 186 (D. Colo. 1993), *rev'd on other grounds*, 43 F.3d 474 (10th Cir. 1994) (The view disallowing CALR expenses as costs is "outdated" and such costs should be allowed because its time-saving attributes are such that it should be reimbursed and encouraged over the additional time and expense for non-computer legal research by attorneys).

The reasoning of these authorities is sound and applicable in the instant case. Without the aid of Westlaw, the defense of this case would have necessitated more attorneys and attorney-time in defense of this case. Westlaw charges are "actual disbursements" and "incidental expenses" reasonably and necessarily incurred in modern defense litigation. More importantly, the equities of this case compel the conclusion that the subject Westlaw charges are taxable. Beneficiaries of the same Native Hawaiian rights asserted by Plaintiffs-Appellants in support of their claims, Lessee Defendants-Appellees are not affluent and did not choose to be involved in this litigation; they were sued by Plaintiffs-Appellants and were forced to defend this litigation through modern techniques. Lessee Defendants-Appellees have been forced endure a division of community, and, in several instances, a division of families, as part of this litigation. It is respectfully submitted that Plaintiffs-Appellants have not established an abuse of discretion in taxation of CALR costs.

VI. *CONCLUSION:*

Based on all the foregoing reasons, it is respectfully submitted that the circuit court's judgment should be affirmed as to Lessee Defendants-Appellees.[10]

---

[10]Plaintiffs-Appellants devote a substantial portion of their Opening Brief dealing with the *denial* of Lessee Defendants-Appellees' Prior Motion regarding res judicata/ collateral estoppel on the grounds of mootness. Since (1) Lessee Defendants-Appellees have *not* filed a cross-appeal on this issue, and (2) any error in such *denial* cannot have affected the substantial rights of *Plaintiffs-Appellants*, any error in such denial is ultimately harmless and cannot be a basis of reversal for purposes of the instant appeal. *See* HRS § 641-16; HRCP Rule 61. Consequently, this issue will not be further addressed in this Answering Brief.

DATED at Honolulu, Hawaii, November 24, 1995.

/s/ Ward F. N. Fujimoto
WARD F. N. FUJIMOTO
Attorneys for Lessee
Defendants-Appellees

STATEMENT OF RELATED CASES

Pursuant to HRAP Rule 28(b)(11), the undersigned counsel is aware of the following related cases:

1. *Leiff Koa Bush, et al. vs. Hawaiian Homes Commission, et al.*, Civil No. 92-0463(2) (Haw. 2d Cir.), Civil No. 92-0603(3) (Haw. 2d Cir.), *aff'd*, No. 16840, 76 Haw. 128, 870 P.2d 1272 (1994) – arise out of same HHC proceedings, previously heard in this Court, involve the same parties, involve the same or closely related issues, and involve the same basic transactions or events;
2. *Lambert Kalani Han, et al., vs. Department of Justice, et al.*, Civil No. 92-00406, 824 F. Supp. 1480 (D. Haw. 1993), *aff'd*, No. 93-15632, 45 F.3d 333 (9th Cir. 1995)- arise out of same HHC proceedings, involve the same parties or their privies, involve the same or closely related issues, and involve the same basic transactions or events; and
3. *Leiff Koa Bush v. Kali Watson, et al.*, No. 18908 (Haw. June 13, 1995) (order of dismissal) – arise out of same HHC proceedings, previously heard in this Court, involve the same parties, involve the same or closely related issues, involve the same basic transactions or events, and prior appeal that was dismissed on the basis of prematurity under HRCP Rule 58 and *Jenkins v. Cades Schutte Fleming & Wright*, 76 Haw. 115, 869 P.2d 1334 (1994).

DATED at Honolulu, Hawaii, November 24, 1995.

/s/ Ward F. N. Fujimoto
WARD F. N. FUJIMOTO
Attorneys for Lessee
Defendants-Appellees

NO. 19154

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, vs. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission; et al., Defendants-Appellees, and MARY K. MAMUAD, et al., Defendants.	CIVIL NO. 94-0305(3) APPEAL FROM AMENDED JUDGMENT, ON ALL CLAIMS BY ALL PARTIES IN THIS ACTION, FILED ON JULY 18, 1995 AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 12, 1994, GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED NOVEMBER 28, 1994, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN, FILED ON MARCH 31, 1995 The Honorable Boyd P. Mossman, Judge Second Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of Lessee Defendants-Appellees' Answering Brief were duly served upon each of the following parties listed below, in the manner described thereto, at their last-known addresses, on November 24, 1995.

	By U.S. Mail	By Hand Delivery
ALAN T. MURAKAMI, ESQ. PAUL F. N. LUCAS, ESQ. ARNOLD L. LUM, ESQ. Native Hawaiian Legal Corporation 1164 Bishop Street Honolulu, Hawaii 96813 *(Attorneys for Plaintiffs-Appellants)*		X
MARGERY S. BRONSTER, ESQ. STEVEN S. MICHAELS, ESQ. GIRARD D. LAU, ESQ. Department of the Attorney General 425 Queen Street Honolulu, Hawaii 96813 *(Attorneys for State of Hawaii Defendants-Appellees)*		X
THOMAS E. COOK, ESQ. Davies Pacific Center 841 Bishop Street Suite 1800 Honolulu, Hawaii 96813 *(Attorney For Licensee Defendants-Appellees)*		X

DATED at Honolulu, Hawaii, November 24, 1995.

/s/ Ward F. N. Fujimoto
WARD F. N. FUJIMOTO
Attorneys for Lessee
Defendants-Appellees

MOLOKAI-LANAI
SOIL & WATER
CONSERVATION DISTRICT
P.O. Box 396 Hoolehua HI 96729
(808) 567-6868
FAX 567-9062

FAX
Cover Sheet

To: Ward Fujimoto Date 6/3/96

Aloha Ward,

This is the agreement/contract that a homesteader would sign from our District to receive/participate in the MAC projects.

If you have any questions, please feel free to call me.

/s/ Debbie Kelly

EXHIBIT "C"

MOLOKAI AGRICULTURAL COMMUNITY
AGREEMENT
between
MOLOKAI-LANAI SOIL AND WATER CONSERVATION DISTRICT
and

_____

[applicant name, address, phone number

THIS AGREEMENT is entered into as of _____ day of_____ 1996, between the name mentioned above, hereinafter referred to as APPLICANT, and the Molokai-Lanai Soil and Water Conservation District, hereinafter called DISTRICT, P. 0. Box 396, Hoolehua, HI, 96729, (808) 567-6869.

1. Applicant and District agree that they are familiar with the Objective and Goals of the FY92 Soil Conservation Allocation for Molokai Agricultural development as contained in the District Handbook of Operational and Administrative Procedures for the administration of same.
2. District agrees to cost share the proposed project as described in the attached application and map in the amount of _____ which is _____% of $_____, the total cost of the project, less applicable cost share amounts from the Agricultural Stabilization and Conservation Service (ASCS) Program. Agreement by District to cost share the project is subject to the availability of funds from the United States Department of Agriculture Soil conservation Service and to the satisfactory completion of the project.
3. Applicant agrees to be responsible for the following:
   a) Becoming a cooperator with the District.
   b) Keep current mailing address on file with District.
   c) Obtain and maintain all required permits necessary to perform the planned work.
   d) Install, operate and maintain conservation and/or development plan set forth in the project plan.
   e) Inform the District of changes of Applicant status and to initiate any contract modifications which may be required as a result of such changes in status.

f) Certify, on request for payment, that Applicant will not receive any duplication of cost share payments from any other cost share program for the conservation or devlopment plan work to be reimbursed through the application for payment.

4. Both Applicant and District agree that the contract include specific description of project and in the length of time the conservation measures included in the project are to be maintained in accord with Applicants plan, conservation plan and applicable USDA SCS standards.

   Applicant agrees to appear at the office of District to sign this contract within five business days after being notified that the plan for the project has been approved by District.

   Both parties agree that Applicant shall have ninety (90) days from the date of the signing of this contract in which to complete the installation of measures and materials as called for in the application. Applicant may be granted one (1) forty five (45) day extension for completing the project provided that District approves such extension and that such extension be requested by Applicant before the original (90) days has expired.

   Both parties further agree that Applicant shall apply for any other qualified cost sharing for any part of the project per the attached application. Participant must furnish to the District satisfactory evidence that such applications have been made.

5. All parts of this agreement/contract shall be subject to the restrictions and regulations described in the District Handbook and to any special provisions listed below:

   *Attachment A - Special Provisions _____

   ** Social Security # - _____

   _____

   _____

   _____

   _____

6. Control of land for Contract Purposes
   a) Any person who controls or shares control of the subject farm, ranch or other land for the contract period must sign the contract.
   b) Control normally means possession of land by ownership, lease or rental agreement.
   c) District is responsible for determining the status of each participant in the contract such as owner, coowner, tenant, partner or operator and making written determination after review of the evidence that Applicant will probably control the land for the contract period.
   d) District shall inform each Applicant of the consequences of failure to complete the contract because of a change in the operators or other loss of control of the land.
   e) Cost sharing payments cannot be provided for any measure that is initiated before the contract is approved by the District.
   f) The contract shall include the basic document, special provisions as needed, a completed conservation plan, a plan and map of the proposed project.
   g) The contract shall require that installed measures and materials shall be operated and maintained for the purposes set forth in the approved application.
   h) The contract period shall be for not less than five (5) nor more than fifteen (15) years and such contract periods shall be established by District on a case by case basis.
7. Contract Distribution
   a) Copies of the contract shall be furnished to Applicant and original on file for USDA scs and District.
8. Contract Modification
   a) Requirements to modify must be approved by both parties.
   b) Reasons for modifications exist if it is determined that a conservation and/or a development plan has failed to achieve the desired results or has deteriorated due to conditions beyond the control of Applicant during the contract period.
   c) Modified contracts must be approved by Applicant, SCS, District and other pertinent technical agencies and must document sound justification for the change.

d) Contract modifications will be effective as of the date District approves contract.

e) Contract modifications shall be signed by all living participants signatory to the contract and all agencies in 8 c) above.

f) No cost share payments will be made for contract modifications if conservation and/or development plans are instituted prior to District approval and availability of funds established.

9. Reapplication of Practices that Fail or Deteriorate

a) Approved modified contract by District and applicable technical agencies to cost share reapplication of failed practices provided that:

1) funds are available
2) reapplication of practices are essential to success of project
3) specifications were properly met in original application
4) failure or deterioration was due to circumstances beyond the control of Applicant

10. Land Transfer

If, during the period of the contract all or any part of the right and interest in the land is transferred by sale or other transfer action, the contract is terminated over the land unit that was so transferred and Applicant having control of such land:

a) Forfeits all right to any future cost sharing payments on the transferred land unit

b) Must refund all cost share payments that have been made on the transferred land unless:

1) the new landowner or operator becomes a party to contract; or
2) it is determined by District that the established plans will provide adequate benefits for the design life of the plan, in which case the cost share payment may be retained.

11. Transferred Land User Contract

If new land owner/operator becomes a party to the contract:

a) Cost sharing payments which have been earned but not made to the Applicant who applied the plan and had control prior to the transfer can be made.

b) Such new land owner or operator shall assume all remaining obligations and benefits of the original Applicant on the transferred land unit.

c) The original contract shall remain in force with the new Applicant with the original conditions unless otherwise approved by District.

d) The contract shall be modified in writing to show any changes caused by such transfer.

12. Contract violations and Appeals

a) Applicant shall be in violation of the contract if:

1) Knowingly or negligently destroys or breaks up a conservation and/or development plan unless prior written approval is given by District.

2) Files a request for cost share payment for a conservation and/or development plan not carried out or carried out in a manner which does not meet District approval.

b) District is responsible to determine if a violation has occurred.

1) If a violation is of such a nature that no penalty, refund, payment readjustment, or termination is necessary, then no notice is given Applicant and no further action is required.

2) If a violation did occur but Applicant agrees in writing to accept the penalty, forfeiture, payment adjustment or termination, then no further action is necessary.

13. Notice of Violation

a) If District believes that a violation has occurred which calls for any penalty or forfeiture, written notice shall be given the Applicant under such contract.

b) Written notice of violation shall be by certified mail with a return receipt requested. It shall set forth the nature of the alleged violation and shall inform the Applicant the opportunity to appear at a Contract Violation Review before the District if a request in writings for such a hearing is received no later than thirty (30) days from receipt of the notice.

14. Contract Violation Review

a) District shall notify Applicant in writing of the time, date and place of Contract Violation upon receipt of request.

b) If Applicant does not file written request, does not appear or have a representative present at a review so requested, Applicant shall have no further right to such a review.

c) District shall make a determination on the basis of a review of violation appeal which shall:
   1) be based on the conservation and/or development plan standards and specifications adopted by the District and in force at the time the plan was prepared.
   2) Shall specifically state whether the violation is of such a nature as to warrant termination of the contract or that such violation does not warrant termination of the contract.

d) Applicant shall be notified in writing of determination by District.

e) A notice of termination, if 60 ordered, shall be sent by certified mail, return receipt, thirty (30) days prior to the effective date of termination.

15. Cost Share Payment

a) District shall make cost share payment upon completed or identifiable units properly installed as stated in plan and meeting specifications determined by an on site inspection.

b) Application for cost share payments must be submitted to the Project Coordinator with pertinent receipts and is the sole responsibility of the Applicant.

c) Assignment of payment contract between District, Vendor, and Applicant is available. In such a case, Vendors are paid directly by District as referred to in #15 a), on behalf of Applicant.

d) No cost share payment shall be made pending a decision by District on whether or not a contract violation has occurred or if contract shall be terminated.

e) If contract is in non-compliance or violation, payment will not be made prior to District determination of action.

17. Quality Control

a) District shall have the right of access at a reasonable time to land or facilities under contract and the right to examine project records, cost share applications and contracts. This is limited to the right to furnish any technical assistance and inspect work performed under the contract and be included in project file.

b) Spot checks to insure conservation and/or development plan design is properly installed and maintained shall be conducted in manner consistent with the policies and procedures of the technical agency (USDA scs).

c) The entity providing technical assistance certifies that each conservation and/or development plan or identifiable unit has been properly installed and completed.

d) Quarterly progress reports of the overall project shall be made by District and USDA SCS to include:

   1) Activities conducted by District and SCS
   2) Funds obligated
   3) Funds expended
   4) Evaluation of each plan's attainment of its goals and value to the overall project requirements.

18. For the purpose of this contract, words used in a masculine gender include the feminine and vice versa where applicable.

19. The District is a State of Hawaii organization and therefore this content is severable. If any rule, or part thereof, or application of such rule to any person or circumstance is declared invalid, it does not affect the validity of the remaining portions.

This Agreement/contract is entered into by the District and Applicant as witnessed by Signatures below:

_____

APPLICANT DATE

_____

DISTRICT OFFICER DATE

NO. 19154

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LEIFF KOA BUSH, MARTIN D. L. KAHAE, COLETTE Y. MACHADO and KELSON "MAC" POEPOE, Plaintiffs-Appellants, vs. KALI WATSON, in his official capacity as Chairperson of the Hawaiian Homes Commission; et al., Defendants-Appellees, and MARY K. MAMUAD, et al., Defendants.	CIVIL NO. 94-0305(3) APPEAL FROM AMENDED JUDGMENT, ON ALL CLAIMS BY ALL PARTIES IN THIS ACTION, FILED ON JULY 18, 1995 AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED OCTOBER 12, 1994, GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED NOVEMBER 28, 1994, AND GRANTING PRIVATE DEFENDANTS' JOINDERS THEREIN, FILED ON MARCH 31, 1995 The Honorable Boyd P. Mossman, Judge Second Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of Lessee Defendants-Appellees' Motion For Reconsideration, Memorandum In Support Of Motion For Reconsideration, Certificate Of Good Faith, Affidavit Of Ward Fujimoto And Exhibits "A" - "C" were duly served upon each of the following parties listed below, in the manner described thereto, at their last-known addresses, on June 3, 1996.

	By U.S. Mail	By Hand Delivery
ALAN T. MURAKAMI, ESQ. PAUL F. N. LUCAS, ESQ. ARNOLD L. LUM, ESQ. Native Hawaiian Legal Corporation 1164 Bishop Street Honolulu, Hawaii 96813 *(Attorneys for Plaintiffs-Appellants)*		X
MARGERY S. BRONSTER, ESQ. GIRARD D. LAU, ESQ. Department of the Attorney General 425 Queen Street Honolulu, Hawaii 96813 *(Attorneys for State of Hawaii Defendants-Appellees)*		X
THOMAS E. COOK, ESQ. Lyons Brandt Cook and Hiramatsu Davies Pacific Center 841 Bishop Street Suite 1800 Honolulu, Hawaii 96813 *(Attorney For Licensee Defendants-Appellees)*		X

DATED at Honolulu, Hawaii, June 3, 1996.

/s/ Ward F. N. Fujimoto
WARD F. N. FUJIMOTO
Attorneys for Lessee
Defendants-Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. _____

LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW,
LORRAINE K. BORDEN, MIRIAM K. BRIONES,
LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI,
EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR.,
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SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI,
WAYNE NAEOLE and WILLIAMETTE P. NEUHART,
Petitioners,

v.

COLETTE Y. MACHADO, LEIFF KOA BUSH,
MARTIN D. L. KAHAE, KELSON "MAC" POEPOE, et al.,
Respondents.

CERTIFICATE OF SERVICE

Pursuant to this Court's Rules 1.3 and 29, I hereby certify that three (3) copies of the foregoing Petition For Writ Of Certiorari was on served on each of the following parties listed below, in the manner described thereto, at their last-known addresses, on or before the date of filing.

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Supreme Court, U.S.
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No. 96-992

In The

Supreme Court of the United States

October Term, 1996

LOUELLA O. W. ALBINO, ALEXANDER R. K. BISHAW, LORRAINE K. BORDEN, MIRIAM K. BRIONES, LOUIS HAO, JR., NANCY KAHINU, EVELYN K. KANAWALIWALI, EMILY W. AKI SWABA, GEORGE R. P. KAHINU, JR., JON K. NAEOLE, DAYNA L. NAEOLE, WEYMOUTH KAMAKANA, JOHN E. KELLY, LOTTIE BURROWS, ARTHUR K. KAAI, DANIEL KEKAHUNA, ALICE K. DEMELLO, SUE ANN M. M. HASEGAWA, PRISCILLA HOLOKAI, WAYNE NAEOLE and WILLIAMETTE P. NEUHART,

Petitioners,

v.

COLETTE Y. MACHADO, LEIFF KOA BUSH, MARTIN D. L. KAHAE, KELSON "MAC" POEPOE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents **COLETTE Y. MACHADO, LEIFF KOA BUSH, MARTIN D. L. KAHAE, and KELSON "MAC" POEPOE** (collectively referred to as "Respondents") respectfully request that this Court deny Petitioners' Petition for Writ of Certiorari (hereinafter "Petition"), which seeks review of the Hawaii Supreme Court's opinion below. That opinion is reported as *Bush v. Watson*, 81 Haw. 474, 918 P.2d 1130 (1996) ("*Bush II*") and is reprinted in the Petition at Appendix A.

STATEMENT OF THE CASE

The Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (July 9, 1921), as amended (hereinafter "HHCA"), *reprinted in* 1 Hawaii Revised Statutes (1993) ("H.R.S.") 167 *et seq.*, established a homestead program for native Hawaiians.[1] The HHCA was adopted as a federal-state compact and as a provision of the Constitution of the State of Hawaii pursuant to § 4 of the Hawaii Admission Act.[2] In these enactments "the federal

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[1] "Native Hawaiians" are defined in the HHCA as including "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." § 201(7), H.H.C.A.

[2] Pub. L. 86-3, 73 Stat. 4 (Mar. 18, 1959) (providing that as a compact with the United States the HHCA shall be adopted as a provision of the Constitution of the State of Hawaii); *see also* Haw. Const., Art. XII, §§ 1-3 (adopting HHCA as "a law of the State," § 1, as "a compact with the United States," §§ 2, 3, and "as a provision of the constitution of this State," § 3).

government set aside certain public lands to be considered Hawaiian home lands to be utilized in the rehabilitation of native Hawaiians, thereby undertaking a trust obligation benefiting the aboriginal people . . . [and] . . . the State of Hawaii assumed this fiduciary obligation upon being admitted to the Union as a state." *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982). The management and operation of the Home lands program is placed with the Hawaiian Homes Commission ("the Commission"), a nine member body appointed by the governor. § 202, H.H.C.A.; § 26-17, H.R.S.

In fulfilling the statutory goals of the Hawaiian Home Lands program, the Commission issues leases for a term of 99 years at $1.00 per year to qualified native Hawaiians for farming, ranching and residential purposes. All lessees are subject to certain statutory conditions expressly set forth in § 208 of the HHCA which regulate the use of their homestead, "whether or not stipulated in the lease." § 208, H.H.C.A.

One condition states that the lessee "shall not in any manner transfer to, or otherwise hold for the benefit of any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department. . . . " § 208(5), H.H.C.A. In implementing § 208(5), the Commission and the Department of Hawaiian Home Land's ("the Department") administrative rules declare that a lessee may not "enter into any contract, joint venture, agreement or other arrangement of any sort with a third person on lands covered by [a] lessee's lease" without the written approval of the Commission. H.A.R. § 10-3-35.

Since 1980, Petitioners, who are all lessees of the Hawaiian homestead program, have entered into Third Party Agreements[3] (hereinafter "TPAs") with Respondents Larry Jefts, et al., non-Hawaiian farmers, for the occupation, use, and cultivation of their agricultural homestead lots on Moloka'i, without the approval of the Commission. *Bush v. Hawaiian Homes Commission*, 76 Haw. 128, 132, 870 P.2d 1272, 1281 (1994) ("*Bush I*"). Petitioners are paid an average of $150.00 per month for the use of their lots, and, at least one non-Hawaiian farmer, Larry Jefts, has amassed close to 495 acres of homestead land, under thirteen different leaseholds. *Id.* The operations of these large plantations have been injurious to Respondents Bush, Kahae and Poepoe, who seek to become economically self-sufficient by farming their own agricultural lots, by infecting them with melon fly infestation, pesticide drift, and by subjecting them to unfair subsidized competition benefiting from substantial economies of scale.

In December of 1991, the Department notified Petitioners that their existing TPAs did not comply with HAR § 10-3-35, and were therefore unlawful. *Bush I*, 76 Haw. at 132, 870 P.2d at 1281. In May of 1992, the Commission approved Petitioners' TPAs over Respondents' objections. *Id.*, 76 Haw. at 133, 870 P.2d at 1281. Respondents had requested a "contested case" administrative hearing in which they could appear and formally contest the

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[3] A Third Party Agreement ("TPA") is an agreement whereby the lessee of an agricultural homestead allows a stranger to the lease to use his or her land for farming or pastoral purposes.

approval of such TPAs, but this request was denied by the Commission. *Id.* This denial was affirmed on appeal. *Id.*, 76 Haw. at 136, 870 P.2d at 1281. The *Bush I* court, however, was careful to point out that Respondents were "not barred from contesting the Commission's actions through alternative means . . . ". *Id.*, 76 Haw. at 137, 870 P.2d at 1281.

Immediately upon the issuance of the *Bush I* opinion in 1994, Respondents filed a new suit, the present action, seeking declaratory and injunctive relief and claiming that the existing TPAs violated sections 208(4) and (5) of the HHCA. The trial court granted summary judgment in favor of Petitioners, Respondents Hawaiian Homes Commission and Department of Hawaiian Home Lands (hereinafter "State Respondents"), and Respondents Larry Jefts et al., concluding that there was no violation of the HHCA. *Bush II*, 81 Haw. at 478, 918 P.2d at 1141.

On appeal, the Hawaii Supreme Court, in a unanimous opinion, reversed the trial court's dismissal of Respondents' claims. *Id.*, 81 Haw. at 478, 918 P.2d at 1141. At the outset, the court noted that "there is no authoritative case law in this jurisdiction interpreting HHCA 208(5)," *Id.*, 81 Haw. at 485, 918 P.2d at 1141, and that "the nature of an agreement between homestead lessees and third parties must be examined closely to determine whether it complies with [the] statutory restrictions [set forth in § 208(5)]." *Id.*, 81 Haw. at 486, 918 P.2d at 1142. After a careful examination of applicable Hawaiian real property law, the court found that the TPAs "address specific parcels of property and are arguably for fixed terms because they require fixed notification periods for revocation", and thus declared that the approved TPAs,

on their face, transfer "at least a portion of the lessees' extant interest in their homesteads" in violation of § 208(5). *Id.*, 81 Haw. at 487, 918 P.2d at 1143. Accordingly, the court ordered that the lower court's order granting summary judgment in favor of the Petitioners, State Respondents, and Respondents Jefts et al. be reversed, and that summary judgment be entered in favor of Respondents. *Id.*, 81 Haw. at 487, 918 P.2d at 1143. From this judgment, Petitioners now seek review in this Court. State Respondents and Respondents Larry Jefts et al. chose not to appeal the Supreme Court's decision.

REASONS FOR DENYING THE PETITION

The Hawaii Supreme Court properly interpreted the HHCA in defining Petitioners' responsibilities thereunder, and, in any event, its interpretation of this unique Congressional enactment, a federal-state compact incorporated as part of the Constitution of the State of Hawaii for the purpose of providing benefits to native Hawaiians, raises no legal questions of more than purely local significance and implicates no substantial issues of federal law. Considerations of federalism argue strongly *against* review of this state court decision affecting only a particular state-run benefit program. Accordingly, Petitioners fail to satisfy criteria traditionally applied by this Court in determining whether or not to grant a Writ of Certiorari.

I.

PETITIONERS DID NOT PRESERVE THEIR "TAKING" CLAIM IN THE COURT BELOW AND THUS CANNOT RAISE IT HERE

Petitioners' sole Question Presented for Review herein is their claim that the "Hawaii Supreme Court has effected a regulatory and/or judicial taking of private property without just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. . . . " Pet., at 2. Petitioners did not, however, raise this issue in their Answering Brief before the Hawaii Supreme Court,[4] but instead first advanced it in their Motion for Reconsideration filed *after* the Hawaii Supreme Court issued its opinion in this case.[5] "A question not previously raised in the course of an appeal will not ordinarily be considered on a petition for rehearing," *Associated Engineers & Contractors, Inc. v. State of Hawaii*, 58 Haw. 322, 322, 568 P.2d 512, 513 (1977) (citations omitted), and Petitioners' Motion for Reconsideration failed to suggest any reason why Petitioners should have been exempted from this generally applicable restriction. Petitioners compounded their error by seeking support for their new arguments in documents not previously made a

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[4] *See,* Lessee-Defendants-Appellees' Answering Brief and Certificate of Service filed November 24, 1995, attached as Exhibit B to Appendix "F" of the Petition.

[5] *See,* Motion for Reconsideration, Memorandum in Support of Motion for Reconsideration, Certificate of Good Faith, Affidavit of Ward F.N. Fujimoto, Exhibits "A"-"C", and Certificate of Service attached as Appendix "F" to the Petition (hereinafter "Petitioner's Motion for Reconsideration").

part of the record.[6] Petitioners cited no authority for this highly unusual procedure[7] and offered no excuse for their failure to present these documents in a more timely manner.[8] The Hawaii Supreme Court properly denied Petitioners' Motion for Reconsideration without addressing the newly raised issues contained therein.[9] "The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it," *Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935), and Petitioners' failure to preserve their "takings" claim for review before the Hawaii Supreme Court is fatal to their efforts to seek review here. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945).

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[6] *See*, Exhibit C, attached to Appendix "F" of the Petition.

[7] *Cf.* Rule 40(b), Hawaii Rules of Appellate Procedure (prescribing the contents of a motion for reconsideration and making no provision for the submission with such a motion of new evidence not previously made a part of the record).

[8] Respondents were not asked to comment on Petitioner's procedural irregularities as Rule 40(c) of the Hawaii Rules of Appellate Procedure provides in part that "[n]o answer to a motion for reconsideration or reply to an answer will be received unless requested by the court."

[9] *See*, Motions for Reconsideration filed 7/8/96, attached as Appendix "B" to the Petition.

II.

THE HAWAII SUPREME COURT CORRECTLY INTERPRETED THE SCOPE OF PETITIONERS' DUTIES UNDER THE HAWAIIAN HOMES COMMISSION ACT

Petitioners ask this Court to hold the Hawai'i Supreme Court's interpretation of § 208(5) of the HHCA as amounting to a "judicial taking" of their leasehold interest without payment of just compensation. Pet., at 15-20. Although members of this Court have on occasion expressed support for a "judicial taking" theory resembling that which Petitioners now espouse,[10] "[t]he question of whether courts, as opposed to legislative bodies, can ever "take" property in violation of the Fifth Amendment is an interesting and by no means settled issue of law." *Corporation of Presiding Bishop v. Hodel*, 830 F.2d 374, 381 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988). In any event, Petitioners' belated efforts to cobble together a factual record to support a judicial takings claim from a melange of supposed "admissions" and documents never properly admitted into the record on appeal are insufficient to support such a claim under any reasonable standard.

Petitioners claim that they were entitled to rely upon a previous ruling on the legality of TPAs under § 208(5)

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[10] *See Hughes v. Washington*, 389 U.S. 290, 296-98 (1967) (Stewart, J, concurring); *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J, joined by O'Connor, J, dissenting from denial of petition for writ of certiorari); *see also Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Haw. 425, 451, 903 P.2d 1246, 1272 (1995), *cert. denied sub nom. Nansay Hawaii, Inc. v. Public Access Shoreline Hawaii*, 116 S.Ct. 1559 (1996).

issued by a state trial court, Pet., at 19 (citing *Adolpho v. Kealoha*, Civ. No. 243 (Second Circuit Court, State of Hawai'i, 1960) is wholly without foundation as such trial court opinions have no binding precedential effect under Hawai'i law,[11] and, in any event, the contentious history of TPAs under the HHCA, described in detail in *Bush II*, 81 Haw. at 483, nn.13 & 14, 918 P.2d at 1139, nn.13 & 14, contradicts any claim that Petitioners could reasonably rely on the legality of TPAs.

Petitioners' claim that the Hawaii Supreme Court's decision deprives them of *all* economic use of their leaseholds hinges solely on a blatant mischaracterization of Respondents' argument below "that it is not economically viable to operate a homestead farm competing against such large-scale operations [as those of Jefts, et al.]." Pet., at 17. In fact, however, Respondents' argument has been that they are unable to compete against such large-scale operations *when those non-Hawaiian farmers benefit unlawfully from the subsidized land and irrigation water properly available under the HHCA only to native Hawaiians.*[12]

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[11] *Bush II*, 81 Haw. at 483 n.14, 918 P.2d at 1139 n.14 (recognizing that the decision of a state circuit court on an issue of law, upon which Petitioners now seek to rely, did not bind the Hawaii Supreme Court); *see also King v. United Commercial Travelers of America*, 333 U.S. 153, 161 (1948) (unappealed decisions of state trial court are not controlling as "authoritative expositions of that State's 'law' ").

[12] As discussed in Respondents' Opening Brief before the Hawai'i Supreme Court, Respondents Larry Jefts' et al.'s farming operations on Petitioner's leaseholds benefit from water provided to those leaseholds at nominal cost by the federally subsidized Moloka'i Irrigation System. *See*, Chapter 168, H.R.S..

Respondents are quite willing to take their chances in competition with Respondent Jefts et al.'s operations on non-trust lands, as those operations do not benefit from subsidies under the HHCA intended only for native Hawaiians. Proof of Petitioners' claims of financial non-viability would require proof as well of the much broader conclusion that the HHCA's agricultural homestead program as a whole, together with all other State of Hawaii programs intended to foster small-scale agriculture such as the Hawai'i Department of Agriculture's Agricultural Park program, Chapter 166, H.R.S., are economically non-viable and are therefore futile.

This is not a case in which a court has radically departed from well-established law by adopting a pretextual interpretation of state real property law to deprive an owner of his or her property rights; instead, the Hawai'i Supreme Court has merely determined, *as a matter of first impression*, the scope of the rights and responsibilities of the beneficiaries of a statutory entitlement program by asking whether the TPAs Petitioners seek to execute are lawful under § 208(5) of the Hawaiian Homes Commission Act, which prohibits a lessee from "transfer[ring] to or otherwise hold[ing] for the benefit of, any other person . . . except a native Hawaiian . . . or to sublet the lessee's interest in the [trust land leased to them]." § 208(5), H.H.C.A.

Petitioners' extensive discussion (at Pet., 7-15), that *Bush II* is inconsistent with prior Hawai'i case law which distinguish between license and leasehold interests, is without foundation as the result here turns on the language of the particular TPAs in question and the statutory rights and responsibilities of a government fiduciary

and of the beneficiaries of the HHCA. The powers of the former entity and the rights of the latter group are necessarily limited by the restrictions imposed by that statute and the administrative rules properly adopted under its authority.[13]

Petitioners' arguments amount to no more than a claim that the Hawaii Supreme Court misinterpreted a provision of the HHCA, a claim not within the scope of Petitioners' "Question Presented for Review," Pet., at 2, and a matter fulfilling none of the criteria which guide this Court in selecting cases for review.[14] Petitioners admit as much by attempting to reargue, *as a matter of policy*, the merits of the Hawaii Supreme Court's interpretation of the HHCA.[15] Accordingly, the Petition for Writ of Certiorari must be denied.

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[13] The *Bush II* court found that when "compared with ordinary leaseholders, Hawaiian homestead lessees do not possess all of the 'sticks in the bundle of rights commonly characterized as property[.]' (citation omitted)". *Bush II*, 81 Haw. at 484, 918 P.2d at 1140.

The *Bush II* court's interpretation of § 208(5) of the HHCA and its application to the specific facts of this case is entirely consistent with other cases involving government restrictions on the use and disposition of federal Indian trust lands. *See, e.g., Ewert v. Bluejacket*, 259 U.S. 129 (1922) (restrictions placed on alienation of lands held by individual Indians are designed to protect the Indians as wards from improvident disposition of their lands, and to protect them from abuses of federal officials).

[14] *See* Rule 10, Rules of The Supreme Court of the United States (Considerations Governing Review on Certiorari).

[15] For example, Petitioner states at page 14 of the Petition that the "public policy precludes treatments of licenses as interests in land". Similarly, at page 18 Petitioner argues that the Hawaii Supreme Court's holding "cannot be consistent with

III.

PETITIONERS ALLEGATIONS OF A REGULATORY TAKING LACK ANY SUPPORT IN THE RECORD

Not satisfied with their wholly unsupported claim of a "judicial taking", Petitioners next attempt to mischaracterize the facts of this case as a "regulatory taking". Pet., at 21-23. As this Court, however, has correctly noted, a regulatory taking will only occur if the property owner is deprived of "all economically beneficial or productive use" of his or her property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Again, Petitioners have failed to point to any reference in the record below that shows that the *Bush II* opinion prohibits a lessee from entering into other arrangements for the occupation, cultivation and use of their agricultural homestead leases.[16]

IV.

PETITIONERS CANNOT SUPPORT THEIR CLAIMS OF INJURY TO "INVESTMENTBACKED" EXPECTATIONS

Petitioners misrepresent the facts of this case when they claim that they "accepted [the Department of Hawaiian Home Lands'] invitation to sign approved TPAs" and therefore "invested, through actions and/or forbearance, time and money into the relationships in reliance on the legal validation of the TPAs by [State Respondents]." Pet.,

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HHCA's goals of rehabilitation and 'betterment' of native Hawaiians through self-determination".

[16] For instance, *Bush II* does not prohibit Petitioners from farming the land themselves or under a "legitimate employment contract" with others, including native Hawaiians. *Id.*, 81 Haw. at 487, 918 P.2d at 1143; *see also* § 208(5), H.H.C.A.

at 25. In fact, as the court found in *Bush I*, Petitioners entered into these TPAs *without approval by State Respondents* and thus were in clear violation of the Commission's administrative rules. *Bush I*, 76 Haw. at 132, 870 P.2d at 1281. State Respondents' attempt to approve the TPAs was a mere attempt to give after-the-fact protection to preexisting transactions and was by no means an "invitation" inducing Petitioners to take action [i.e., initiate TPAs] they would not otherwise have undertaken. Indeed, the absence of any reliance by Petitioners on the supposed "legal validation of the TPAs by the DHHL/HHC" is clearly demonstrated by the fact that the TPAs contained language expressly agreeing to indemnify the State Respondents from any expenses resulting from their approval of the TPAs.[17] In any event, those who, like Petitioners, transact business with a trustee are bound by the limits of the trustee's authority to bind the trust, and any transaction violative of the terms of the trust is void *ab initio* and does not create liability on behalf of the trust in favor of Petitioners.[18]

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[17] As the *Bush II* court correctly found, the TPAs expressly provided that Petitioner and Respondent Larry Jefts et al. would indemnify the Department against "all losses, damages, costs, expenses . . . on account of any demand, claim or suit for any loss of damage to property, property right or injury or death to any person arising out of, caused by or in any way connected with the implementation, use, or reliance upon this Third Party Agreement". *Bush II*, 81 Haw. at 482, 918 P.2d at 1138.

[18] *See, e.g., United States v. Algoma Lumber Co.*, 305 U.S. 415, 422 (1939) (United States not liable to third party when it contracts on behalf of Indian tribes); *Sangre de Cristo Development Co. v. United States*, 932 F.2d 891, 895 (10th Cir. 1991), *cert. denied*, 503 U.S. 1004 (1992).

V.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

RULE 40, HAWAII RULES OF APPELLATE PROCEDURE (HRAP)

Rule 40, Motion for Reconsideration

(a) **Time.** A motion for reconsideration may be filed by a party only within 10 days after the filing of the opinion or ruling unless by special leave additional time is granted during such period by a judge or justice of the appellate court involved.

(b) **Contents.** The motion shall state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. The motion shall also be supported by a certificate of counsel to the effect that it is presented in good faith and not for purposes of delay.

(c) **Answer; Reply; Argument.** No answer to a motion for reconsideration or reply to an answer will be received unless requested by the court. There shall be no oral argument on a motion for reconsideration unless ordered by the court on its own motion.

(d) **Disposition of Motion.** The court within 10 days of the filing of a motion for reconsideration, shall either grant or deny such motion. The failure of the court to act within the 10 days shall constitute a rejection. If a motion for reconsideration is granted, the court may modify the decision without new argument, order new argument, or take such action as may be appropriate.

(e) **Only One Motion Permitted.** Only one motion for reconsideration may be filed by any one party, even if the court modifies its decision or changes the language in the opinion rendered by the court.